

**RIGHTS OF THE ACCUSED IN INTERNATIONAL CRIMINAL
LAW, AND ISLAMIC CRIMINAL LAW**
(A COMPARATIVE LEGAL STUDY)



A dissertation submitted in partial fulfillment of the requirements for the
degree of Master of Laws (LL.M Human Rights Law)

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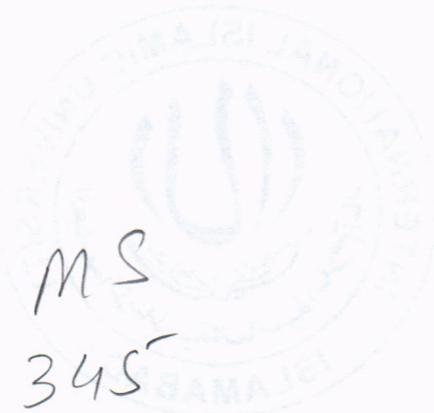
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INTERNATIONAL ISLAMIC UNIVERSITY ISLAMABAD
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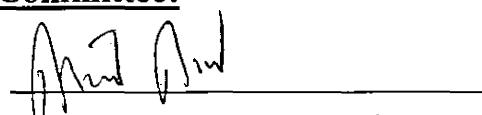
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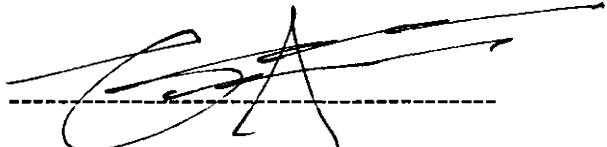
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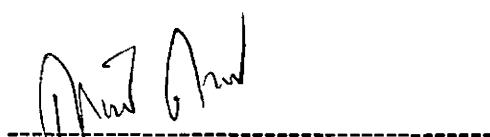
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DEDICATION

This Dissertation is dedicated to:

My Parents

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ABSTRACT

My research work consists upon the rights of accused in the light of international criminal law and Shariah. Then it is an analytical and legal study comparison of both the laws.

The Aims and Objectives of this research work are to identify the rights of accused in International Criminal Law and Islamic Criminal Law. It also compares the rights of accused in International Criminal Law and Islamic Criminal Law. The one angle of this contribution is going to know that International criminal Law benefits from Islamic Criminal Law. Here it is mentioned, that law commands to provide all valid tools for the best interest of accused and he is to be considered innocent till proved guilty. The landmark view point has also been shared to trace out all unpracticed rules, which the judicature system needs for accused. This research work is focusing on the analysis of the existing rules made for the accused in both international and Islamic criminal law. It concentrates on the scrutiny of the different approaches and observations of International criminal Law and Islamic criminal law scholars. It explores the concept and importance of new rights of accused.

My methodology of research is comparative research. This research would clarify the compatibility of Islamic and international criminal law. It depends on both the inductive and deductive ways. It is a descriptive and applied research. The data has been collected from authentic and authoritative books, journals, articles, literatures, and internet. Legal and English dictionaries have been used/consulted for the explanation of technical terms. The portion of international criminal law has been covered by the utilization of international documents and considered instruments, while the area of Islamic criminal law has been compiled through the help of religious texts viz Holy Quran, Tradition of the Prophet of Islam and adhered the Islamic

books of jurisprudence and law by the Scholars of Islamic Law. Here in this contribution, the role of internet is very clear and conspicuous, which provided reliable resources and materials. The crux of entire study is on analysis and comparison, so compatibility may be easily understandable after thorough study.

This dissertation explores very technical conclusion, firstly provides the general structure of Islamic criminal law and later exposes rights of the accused in the eye of Islamic criminal law as well as international criminal law. It also produces those factors which explain, that Islamic law is universally accepted law while on the other hand, international law is manmade law, having ambiguity and flaw. International criminal law has taken benefit from Islamic law.

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List of Abbreviations and Acronyms

ACHR:	American Convention on Human Rights (1969)
ACHPR:	African Charter on Human and People' Rights (1981)
Ar CHR:	Arab Charter of Human Rights (1994)
Art:	Article
CPHRFF:	Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
CAT:	Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment (1984)
Cl:	Clause
CRC:	Convention on the Rights of the Child (1989)
CEDAW:	Convention on the Elimination of all forms of Discrimination Against Women (1979)
ECPTT :	European Convention for the Prevention of Torture and Inhuman Or Degrading Treatment or Punishment (1987)
HLR:	Human rights Law
ICC:	International Criminal Court

ICESCR:	International Covenant on Economic Social and Cultural Rights (1966)
ICCPR:	International Covenant on Civil and Political Rights (1966)
IICJ:	International Islamic Court of Justice
ICJ:	International Court of Justice
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the Former Yugoslavia
IHL:	International Humanitarian Law
OHCHR:	Office of the High Commissioner for Human Rights
Para:	Paragraph
PBUH:	Peace Be Upon Him
SAW:	Sallalaho Alaihi Wa sallam
SWT:	Subhanaho Wa Taala
UDHR:	Universal Declaration of Human Rights (1948)
UNO:	United Nations Organization

INTRODUCTION

The term accused is an English terminology which means ‘a person who is on trial for committing a crime. An accused is a person charged with a criminal offence, or the state of being so charged.

In modern era the study of rights of the “accused in international criminal law and Islamic criminal law is extremely important. There is uncertainty and ambiguity in the minds of public at large and also a very hot topic of discussion. This debatable issue expanded to the comparison between the both systems. Keeping in mind the above I proceeded as under:

My first chapter is just general and introductory, providing basic information about rights, human rights, and crimes.

Second chapter of this work, provides rights of the accused in international criminal law. International criminal law classified the accused trial stages into three.

1. The rights of accused before trial and during investigation, it is one of the initial stage for trial.
2. The rights of accused during trial, It is the main stage of the trial.
3. The rights of accused after trial, during this stage the accused may claim the right, of appeal, justice and acquittal.

The rights of accused is a “class “of civil and political rights that apply to a person accused of a crime, from when he is arrested and charged to when he is either convicted or acquitted .Rights of the accused are generally based on the maxim of “presume accused innocent until proven guilty” and embodied in due process. Some of these rights are the right to indictment by a grand jury, protection from double jeopardy, protection against self-incrimination, right to a fair and

speedy public trial, right to a trial by jury, notice of accusations, right to confront one's accuser, right to counsel, protection to excessive bail and fines.

Accused has the Right to Protection against Torture, other Cruel, Inhuman or Degrading Treatment or Punishment. Every one charged with a penal offence has the rights to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. All people are presumed innocent until proven guilty in accordance with the international documents such as UDHR, ICCPR, Rome Statute and the International Criminal Court and the rules of ICC. So many instruments of international criminal law provide rules, procedures and evidence include measures that protect the rights of the accused at all times. This ensures that individual grave accused of the world; can receive a fair trial which is another corner stone of international criminal law.

The international law recognizes immense rights of the accused which is the significant need of the time. In this regard international criminal law interrupted in the rights of accused provided by Islamic Criminal Law, and obtained a lot of assistance from that.

The third chapter consists upon the rights of accused in Islamic criminal law. Islam provided those rights to the accused which may not ever find any place in other system of laws.

The forth chapter is comparison between International criminal and Islamic criminal law having a landmarked position and played very pivotal role, for the understanding of general law as well. Here it is mentioned that international Criminal law benefited from Islamic Criminal Law. In narrow sense rights of the accused provided in international criminal law are partially compatible with Islamic criminal law.

On the other hand rights of the accused provided in International Criminal Law are contradictory to the Islamic Criminal Law, because international criminal law has taken partial

benefit from Islamic criminal law. Therefore all aspects of Islamic criminal law are not covered by the international criminal law.

(We have honored the sons of Adam; XVII: 70)

Chapter-I

Introduction to human Rights and the Rights of Accused

1.1 Meaning Scope and origin of the term “Rights”

The word ‘right’ has comprehensive and vast meaning. Black’s Law Dictionary defines the term ‘right’ in the following words: That which is proper under law morality, or ethics.¹ The literal meaning of ‘right’ is morally good or acceptable, true or correct as a fact, correct for a particular situation or thing or for particular person, in a normal or satisfactory condition.² Thus, right means exactly, directly, all the way; completely, immediately; without delay.³

Therefore, etymologically the meanings of right are exactly as: Just, Fair, Equitable, impartial, good, upright, righteous, virtuous, proper, moral, ethical, honorable, honest, principled, lawful, and legal.

A very famous Jurist Sir John Salmond has defined, that a right is an interest recognized and protected by a rule of right. It is an interest, respect for which is a duty, and the disgrace of which is wrong.⁴ After the above meanings and definitions, according to Prof. Sir John Salmond the literal meaning of right is Right is that to which a person

¹ Bryan A Garner, *Black's Law Dictionary* (Thomson West: West publishing, 1999), 1719.

² A.S Hornby, *Oxford Advanced Learners Dictionary of Current English* (Oxford: Oxford University Press, 2004), 1100.

³ *Ibid.*, 1100.

⁴ Sir John Salmond, *Jurisprudence* (Lahore: PLD. Publishers, 2010),142.

has a just or lawful claim.⁵ Interest which will be recognized and protected by rule of law, respect for which is a legal duty and violation of which is a legal wrong. “Human Rights exist as moral and /or legal rights. A human right can exist as a shared norm of actual human moralities, as a justified moral norm supported by strong reasons, as a legal right at the national level or as legal right within international law.⁶ Moreover ‘right’ being a dynamic meaning and concept, we are concerned only with human rights.

1.2 Human Rights

Human rights are the birth rights of all human beings, their protection and promotion is the first responsibility of governments.⁷ H.R are the fundamental natural rights which are the most precious possession of mankind and a world without them will have to face a perpetual risk of moral depredation.⁸ The political scientist Alison Brysk expresses in her *Globalization and Human Rights*, the legal approach to human rights: Human Rights are a set of universal claims to safeguard human dignity from illegitimate coercion, typically enacted by state agents.⁹ Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status.¹⁰ We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.¹¹

⁵ Prof. Sir John Salmond, *Jurisprudence* (Lahore: PLD. Publishers, 2010),142.

⁶ Imran Ahsan Khan Nyazee, *Jurisprudence* (Islamabad: The Federal Law House, 2007)70.

⁷ World Conference on Human Rights held in Vienna in June 1993, Para 2 (a).

⁸ SC Joshi, *Human Rights Concepts, Issues and Laws*, (New Delhi: Akansha Publishing House, 2007)1.

⁹ Mark Goodale and Sally Engle Merry, *The Practice of Human Rights Tracking Law Between the Global and the Local*(Cambridge: Cambridge University Press,2007)6.These norms are codified in a widely endorsed set of international Undertaking: the UDHR,ICCPR,ICSER, Phenomenon specific treaties on war crimes ,Geneva Conventions, genocide, and torture ;and protection for vulnerable groups such as CRC, and CEDAW.

¹⁰ <http://www.ohchr.org/EN/AboutUs/Pages/Copyright.aspx>. (Accessed: 03/01/2012).

¹¹ *Ibid.*, (Accessed:03/01/2012)

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law.¹² International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.¹³

Human rights are international norms that help to protect all people everywhere from severe political, legal, and social abuses.¹⁴ A globally accepted set of rights or claims to which all human being are entitled by virtue of their humanity and without distinction on grounds such as race gender or religion yet there can be no prospect of the universal application of such rights unless there is at least substantial agreement on their concept scope and content.¹⁵

Human Rights is a vast and complicated phenomena which provides rights to all human being, whatever his age, status, position, race, color, sex, language, opinion, birth. The study of Human Rights in-bounds all aspects and all folds of human rights, while my topic is concerned only with the rights of accused. In the sake of accused to know him and his rights, the basic principles such as crime, criminal law, justice, punishments has been discussed before his rights in *Shariah* and international law.

¹² <http://www.ohchr.org/EN/AboutUs/Pages/Copyright.aspx>. (Accessed: 03/01/2012).

¹³ *Ibid.*,

¹⁴ <http://www.stanford.edu/> (Accessed: 10/09/2011) .Examples of human rights are the right to freedom of religion, the right to a fair trial when charged with a crime, the right not to be tortured, and the right to engage in political activity. These rights exist in morality and in law at the national and international levels. They are addressed primarily to governments, requiring compliance and enforcement.

¹⁵ Abdulahi An-Niam, Edited by Mashood A Baderin, *Islam and Human Rights* (Cornwal: Ashgate Union Road Farnham,2010)3-4.

1.3 Introduction to Criminal law

1.3.1 Meaning and Scope

The word crime is difficult to define because of the lack of general agreement on its meaning, but an attempt at a definition must precede its study. *The Oxford Advanced Learner's Dictionary* explained the word "crime" as an illegal activity that can be punished by law.¹⁶

The term crime means a social harm that the law makes punishable; the breach of a legal duty treated as the subject-matter of a criminal proceeding.¹⁷ "A crime is an act that violates the criminal law and is punishable by the state. It is considered an offence against the state rather than an act against a specific individual."¹⁸

Criminal law defines offences and prescribes punishments for them. It not only prevents crimes but also punishes the offenders. Criminal law is necessary for the maintenance of law and order and peace within the state.¹⁹ Crime is an intentional act or omission in violation of criminal law (statutory and case law), committed without defense or justification and sanctioned by the state as a felony or misdemeanor.²⁰ The purpose of criminal law is to maintain peace in society by way of preventing crimes. And prevention of crimes is best assured by deterring offenders and people with a proclivity to commit crimes, by way of the threat of or imposition of punishment. This is being done by the

¹⁶ A S. Horn by, *Oxford Advanced Learners Dictionary of Current English* (Oxford University Press, 2004), 297.

¹⁷ Bryan A Garner, *Black's Law Dictionary* (USA: West publishing Co., 1999), 1719.

¹⁸ John E. Conklin, *Criminology* (Library of Congress Cataloging-in-Publication Data, United states of America, 1992), 6.(364 CON). Some Jurists Differentiate the "Offence" from crime is as : any act or omission made punishable by any law for the time being in force.(Cr PC, Section 4(o)).

¹⁹ Dr.V.D. Mahajan, *Jurisprudence*(Lahore:Irfan Law Book House,2000),95.

²⁰ Sue Titus Reid, *Crime and Criminology* (Susan Meyers, Holt, Rinehart and Winston, Inc, Fifth Edition, 1976),5.

declaration of some acts as offences under the law.²¹ The general principles of criminal law apply to all crimes. Every crime has some common features. These physical and mental elements, their concurrence and the resulting harm govern the material elements in crime. The principles that cover the material elements in criminal responsibility include legality and punishment.²² Al-Sarakhsī says Know that the term 'crime' (*jinayah*) is used for an act that is forbidden by the law irrespective of its being directed at property or life, but in the jargon of the fuqaha the term *jinayah* is applied to an act directed against life and limbs.²³ Crimes, in law as well as in Islamic law on the whole, are wrong that are sufficiently injurious to the public to warrant the application of criminal procedure to deal with them.²⁴

The principles/essential elements of Criminal Law consist of seven ultimate notions expressing

I. Mensrea,

II. Act (effort),

III. The concurrence (fusion of mens rea and act)

IV. Harm

V. Causation

²¹ K.N. Chandrasekharan Pillai, *General Principles of Criminal Law* (Lucknow: Eastern Book Company, 2003), 01.

²² K.N. Chandrasekharan Pillai, *General Principles of Criminal Law* (Lucknow: Eastern Book Company, 2003), 85.

²³ Imran Ahsan Nyazee, *General Principles of Criminal Law* (Islamabad: Federal Law House, 2007), 22.

²⁴ *Ibid.*, 22.

VI. Punishment and

VII. Legality.²⁵

The seven principles can be reduced to three conceptions: law, crime, and punishment.²⁶

A Latin maxim

“Actus non facit reum nisi mens sit rea” which means the intent and the act must both concur to constitute the crime. No one is authorized to punish any body without specific laws forewarning the accused that particular conduct will be dealt with by way of punishment in a particular manner.²⁷ Legality includes the following:

Nullum crimen sine lege: the principle that nothing is a crime without a specific law defining it as such,

Ex-post facto laws: laws passed after the occurrence of the conduct,

Nulla poena sine lege: the principle that no punishment is administered without specific authority in law, it helps to evolve norms embracing both crime and punishment the principle of legality is the most fundamental principle in criminal law.²⁸

Criminology is a scientific study of crime, criminality and justice. It studies the nature, extent, etiology, cause, consequence, control and prevention of criminal behavior.²⁹ Criminology is ‘the study of law-making, law-breaking and response to law-

²⁵ Imran Ahsan Nyazee, *General Principles of Criminal Law*(Islamic and Western)(Islamabad, Shariah AcademyIIU,Islamabad,2007),11.

²⁶ Imran Ahsan Nyazee, *General Principles of Criminal Law*(Islamic and Western)(Islamabad, Shariah AcademyIIU,Islamabad,2007),11.

²⁷ K.N. Chandrase kharan Pillai, *General Principles of Criminal Law*(Luc know: Eastern Book Company Lucknow,2003)85.

²⁸ Ibid.,

²⁹ Rohinton Mehta, *Crime and Criminology a Socio-Legal Analysis of the Phenomenon of Crime* (new Delhi, Snow White Publications Mumbai, 1999),13.

breaking. It is the scientific, medical and academic research of crime, criminality and criminal justice enforcement.³⁰

1.3.2 Islamic Criminal Law and Justice

Islamic criminal law is a subset of Islamic law. Strictly speaking, Islamic law does not have a distinct body of criminal law, as *Shariah* courts do not have prosecutors, and all matters, even criminal ones, are in principle handled as disputes between individuals. "Procedural safeguards are prescribed neither in the *Quran* nor in the *Sunnah*, but are left to the discretion of the ruler who is responsible for the public welfare. The ruler's formulation of procedural rules, however, is guided by various *Quranic* principles.³¹ *Black's Law Dictionary* defines the word Justice as "The fair and proper administration of laws is called justice."³²

When certain primary public rights are violated the wrong is called *ma'a'siat*, that is, "crime or offence; and it gives rise to certain substitutory public rights in the form of punishments (*uq'bat*).³³ Criminal offences relate mostly to property, human body, reputation, the state, religion, public peace and tranquility, decency, or morals.³⁴ Major crimes are now governed by the provisions of Islamic law. This means that two sets of principles, one based on divine law and the other on positive law, are operating at the same time in the realm of criminal law. The need to understand the principles of Islamic

³⁰ Rohinton Mehta, *Crime and Criminology a Socio-Legal Analysis of the Phenomenon of Crime*, (New Delhi: Snow White Publications Mumbai, 1999),13.

³¹ Matthew Lippman, *Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law*, 12, (B.C. Int'l & Comp. L. Rev. 29 (1989), <http://lawdigitalcommons.bc.edu/iclr/vol12/iss1/3> (Accessed: 31/01/2012).

³² Bryan A Garner, *Black's Law Dictionary* (Thomson West: West publishing Co., 1999), 869.

³³ Abdur Rahim, M.A., *The principle of Muhammadan Jurisprudence*(Lahore, P.L.D. Publishers Nabha Road, Lahore, 2004),361.

³⁴ Zafar hussain Chaudhary, *Islamic Law of Hudood & Tazir Introduction to Islamic Law of Crimes* (Lahore, Lahore Law Times Publications, Urdu Bazaar Lahore, 1983),1.

criminal law in addition to those of Western law is, therefore, immense.³⁵ Islam imposes a rigid code of punishment for the microscopic minority of criminals and ensures an atmosphere of peace and security for the rest of the society.³⁶

In Islamic criminal law the punishment is based upon to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual and public interest. This is evident from the public and private interests that the *Shariah* seeks to preserve and protect.³⁷

Punishments are divided into three classes: one of which is called *hadd* the other *taazir* with *qisas* being associated with *hadd*. *Hadd* means measure, limit and, in law, it means a punishment, the measure of which has been definitely fixed. In *taazir*, on the other hand, the court is allowed discretion both as to the form in which such punishment is to be inflicted and its measure.³⁸

As opposed to other legal systems, in which crimes are generally considered violations of the rights of the state, Muslim Jurists in Islamic law divides crimes into four different categories depending on the basis of the right affected and violated. The classification on the nature of rights is linked directly with procedure.³⁹

Hadd: violation of a right of God.

Ta'zir: violation of the right of an individual.

³⁵ Imran Ahsan Nyazee, *General Principles of Criminal Law(Islamic and Western)*(Islamabad, *Shariah* Academy IIU, Islamabad, 2007),7-8.

³⁶ http://saif_w.tripod.com/index.htm. (Accessed: 03/01/2012).

³⁷ Imran Ahsan Nyazee, *General Principles of Criminal Law* (Islamabad, *Shariah* Academy IIU, Islamabad, 2007),31.

³⁸ Abdur Rahim, *The Principle of Islamic Jurisprudence* (New Delhi, Publishers Kalan Mahal ,Darya Ganj,1911,Reprinted:1994),343.

³⁹ Imran Ahsan Khan Nayazee, *Islamic Jurisprudence* (Islamabad: Islamic Research Institute Islamabad, 2000), 98.

Qisas: violation of the mixed right of God and of an individual in which the right of the individual is deemed to predominate.

Siyasah: violation of the right of the state

Punishment fits the crime. The individual is to be punished in accordance with the harm inflicted upon humanity, society, and God.

The penalties for *Hudood* offenses are specified in the *Quran*. *Qisas* require equivalence between the crime and its punishment. The punishment of *Ta'azir* is usually guided by community consensus (*ijma*), by custom (*al-urf*), or by analogy to offenses with fixed penalties (*Qiyas*).⁴⁰

1.3.3 International Criminal Law and Crimes

International criminal law is a subset of international law “International criminal law is an autonomous branch of law which deals with international crimes and the courts and tribunals set up to adjudicate cases in which persons have incurred international criminal responsibility. It represents a significant departure from 'classical' international law which was mainly considered law created by states for the benefit of states, but tended to ignore the individual as a subject of the law.⁴¹ The aim of the penal system is to reduce crime by making as many people as possible want to obey the criminal law and the general practice of punishment by the state is only justified if it has to objectives, the reduction of crime and the promotion of respect for the criminal law.⁴²

⁴⁰ Muhammad Iqbal Siddiqi, *The Penal Of Islam* (Lahore: Kazi Publishers 1979), 50 and 52.

⁴¹ <http://www.hg.org/crime.html> (Accessed: 21/01/2012).

⁴² Sir Rupert Cross, the English Sentencing System, 3rd Edition (London: Butterworth's, 1981), 121.

1.4 Accused in International Criminal Law

The term accused is an English terminology which is explained in Black's Law dictionary in these words: 'a person whom someone has blamed for wrongdoing.'⁴³ Further it is defined specifically a person who has been subjected to actual restraints on liberty through an arrest or a person against whom a formal indictment or information has been returned.⁴⁴ Accused defined in Oxford Advanced Learners Dictionary that 'a person who is on trial for committing a crime.'⁴⁵ A person charged with a crime.⁴⁶

The celebrated rule is that in the eyes of law a man is innocent unless proved otherwise. Therefore it is on the prosecution to prove the guilt against him with which he may have been charged. It is not for the accused to prove his innocence straightway.⁴⁷ The rights of accused start from very early stage, when he is becoming an accused and up to the end of, either acquittal or conviction. The Universal Declaration of Human Rights is an International bill of human rights. It supports all types of person subject only to such limitations as are determined by law. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.⁴⁸ Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on extreme old age also on pregnant women.⁴⁹

⁴³ Bryan A Garner, Black's Law Dictionary (USA: West publishing Co., 1999), 1719.

⁴⁴ Bryan A Garner, Black's Law Dictionary (USA: West publishing Co., 1999), 1719.

⁴⁵ A S. Horn by, *Oxford Advanced Learners Dictionary of Current English* (Oxford University Press, 2004), 9.

⁴⁶ General and Kathleen Hill and Kathleen T. Hill, <http://www.farlex.com/hills.htm> (Accessed:12/02/12).

⁴⁷ Raja Arshad, and KH.AH Khalid Butt, *Irfan LL.B, Part -I Get Through Guide* (Lahore: PLD Publishers, 2002),171.

⁴⁸ ICCPR , Art., 6(4).

⁴⁹ *Ibid.*, 6(5).

Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.⁵⁰ No one shall be subjected to arbitrary arrest, detention or exile.⁵¹

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.⁵²

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.⁵³

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.⁵⁴ Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.⁵⁵ A Person shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.⁵⁶

⁵⁰ ICCPR, (6).

⁵¹ UDHR, Art., 9.

⁵² ICCPR, Art., 9(1).

⁵³ *Ibid.*, (9) Clause (3).

⁵⁴ *Ibid.*, Article 9 (4)

⁵⁵ *Ibid.*, 9 (5).

⁵⁶ The Rome Statute of the International Criminal Court, Article 55(d).

1.5 Crimes against humanity

International criminal law introduced various kinds of crimes regarding to nature, and circumstance. While we are not concerned to the all kinds of crime, except those which are discussed in the Rome Statute of International Criminal Court, or crimes against, human rights, which make a person accused except terrorism and aggression⁵⁷

Article (7) of the Rome Statute of the International Criminal Court, exhaustively defines the crime against humanity is as:

“Any of the following acts when committed as part of a widespread or systematic attack directed against any human body, with knowledge of the attack:

(1) Murder.

(2) Extermination;

(3) Enslavement;

(4) Deportation or forcible transfer of population;

(5) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(6) Torture;

(7) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced

⁵⁷ This is a list of some crimes: Serious Violent Crimes •Murder and no negligent manslaughter •Violent Sex Crimes and Forcible Rape •Robbery •Homicide and Aggravated assault •Serious Property Crimes •Common Property Crime •Public Order Crime • Burglary •Larceny-Theft •Motor vehicle theft •Arson.

sterilization, or any other form of sexual violence of comparable gravity;

(8) *Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;*

(9) *Enforced disappearance of persons;*

(10) *The crime of apartheid;*

(11) *Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*⁵⁸

⁵⁸ Rome Statute of the International Criminal Court, Art 7.

Chapter-II

The Rights of Accused in International Criminal Law

Introduction

This chapter deals the rights of accused given by international criminal law. When a crime is committed against person or state, this is the duty and function of the state to try the case against which charge/allegation made, and before the trial begins the concerned authority of the state has to find out the accused, to investigate the case, and to ascertain the evidence against him till to acquit or convict. It is worth mentioned to explain, that a person against whom charge made is called 'accused'.

According to the general principle of international criminal law accused shall be presented before the court for trial. The international criminal law considers the trial of accused into three stages. The first stage is 'before trial', then comes the second is known as 'during trial stage' and the last stage is called 'post trial' of accused. The rights of accused exist in each state of the world, same also approved to international criminal law. The accused has to be processed from the following different procedures and proceedings. The authority concerned shall:

- (i) Initiate the investigation, arrest, interrogation, search, seizure etc.
- (ii) Collect all evidences, records, whether in favor or against of the accused.
- (iii) Investigate and inquire the place of situation/occurrence.
- (iv) arrest, detain, the Accused
- (v) search the required person/s

- (vi) Serve summon for the attendance of a person or to produce document, thing or other movable property.
- (vii) Issue warrant/search warrant of arrest for the production of a person, or the search for a thing which is required.
- (viii) Attach the property of person absconding.
- (ix) Trial before court to be conducted by public prosecutors.
- (x) Supply of statements and documents to the accused.
- (xi) Dismiss accusations or charges against the accused in case of no sufficient grounds for proceedings or no incriminating evidence.
- (xii) Release the accused when evidence and incrimination deficient.
- (xiii) Commence the proceedings.
- (xiv) Fully provide the rights to accused whether in practice and that not in practice.
- (xv) Consider the accused innocent until proved him guilty.
- (xvi) Not condemn the accused unheard.
- (xvii) Ensure the proper administration of justice.

The international criminal law provides some rights and privileges to accused during the subjects of above mentioned stages and proceedings, which are discussed below in detail.

2.1 Rights of Accused during Investigation

The international criminal law considers the accused as a legal person, provides him various civil and fundamental rights. Due to this reason criminal law always treats the accused different from the convicted. International criminal law accepts all his rights and privileges given by law during investigation and trial. That is why we can say International Criminal law presumes the accused innocent is like a white eagle, until proven guilty.

In respect of an investigation under the Rome Statute of the International Criminal Law, a person: shall not be compelled to incriminate himself or herself or to confess guilt.⁵⁹ This article is sufficiently wide to include an accused person on investigation shall not be tortured provided that during investigation a person Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment.⁶⁰ The Article, 55 (1) Clause (c) provides, that a person Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness.⁶¹

According to Rome Statute of International Criminal Court a person whom investigation is required, shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in law.⁶² The Rome Statute ensure the rights of persons during an investigation in these words: Where there are grounds to believe that a person

⁵⁹ Rome Statute of the International Criminal Court, Art.55 (1)(a).

⁶⁰ *Ibid.*, Art.55 (1)(b).

⁶¹ *Ibid.*, Art.55 (1) (c).

⁶² *Ibid.*, Art.55 (1) (d).

has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made... that person shall also have the following rights of which he shall be informed prior to being questioned.⁶³

- (1) To be informed, prior to being questioned, that there are grounds to believe that he has committed a crime within the jurisdiction of the Court.⁶⁴
- (2) To remain silent, without such silence being a consideration in the determination of guilt or innocence.⁶⁵
- (3) Article 55(2) (C) of the ICC statute furnishes the legality of legal practitioner for assistance of accused during investigation. He shall be informed prior to being questioned.⁶⁶
- (4) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it.⁶⁷

To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.⁶⁸ The pre-trial court may, where necessary, provide for the protection and privacy of person who has been arrested or appeared in response to summon and the protection of national security information.⁶⁹

⁶³ Rome Statute of International Criminal Court, Art. 55 (2).

⁶⁴ *Ibid.*, Art.55(2)(a).

⁶⁵ *Ibid.*, Art. 55(2) (b).

⁶⁶ *Ibid.*, Art. 2(c).

⁶⁷ *Ibid.*, Article 55(2) (c).

⁶⁸ *Ibid.*, Art. 55(2) (d).

⁶⁹ *Ibid.*, Art. 57 (3)(c).

2.1.1 Right of Presumption of Innocence of an accused

Most International Human Rights Documents expound this maxim *Ei incumbit probatio qui dicit, non qui negat*, is the principle that one is considered innocent until proven guilty. Presumption of innocence is the milestone and very basic right of accused. This right is recognized in international criminal law and important in criminal trial, international. It is basic right, like an axle of wheel and all other rights revolve around this.

The International Bill of Human Rights declare, everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.⁷⁰

Article 66 of The Rome Statute of the ICC considers the Presumption of innocence that; everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.⁷¹

The burden of proof is thus on the prosecution, which has to collect and present enough compelling evidence to convince the judge of fact, who is restrained and ordered by law to consider only actual evidence and testimony that is legally admissible, and in most cases lawfully obtained, that the accused is guilty beyond a reasonable doubt. If reasonable doubt remains, the accused is to be acquitted The Rome Statute of the ICC adds that the onus is on the Prosecutor to prove the guilt of the accused.⁷²

⁷⁰ UDHR, Article11 (1)..

⁷¹ The Rome Statute of the International Criminal Court Article 66 (1)

⁷² *Ibid.*, Article66 (2)

Regarding the charge having insufficient evidence it is worth mentioning that the pre trial court shall decline to confirm those charges in relation to which it has determined that there is insufficient evidence.⁷³

The pre trial chamber shall adjourn the hearing and request the Prosecutor to consider:

- (i) Providing further evidence or conducting further investigation with respect to a particular charge.⁷⁴
- (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.⁷⁵

American Convention on Human Rights state as follow: ---Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.⁷⁶

African Charter on Human and people Rights affirm every individual shall have the right to have his cause heard. This comprises the right to be presumed innocent until proved guilty by a competent court or tribunal.⁷⁷

Convention for the Protection of Human and Fundamental Freedoms observe that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.⁷⁸

Statutes of ICTR, and ICTY, state the accused shall be presumed innocent until proved guilty according to the provisions of law.⁷⁹

⁷³ Rome Statute of International Criminal Court, Art.61 (7)(b).

⁷⁴ *Ibid.*, Art. 61(7) (c)(i).

⁷⁵ *Ibid.*, Art .61 (7) (c) (ii).

⁷⁶ American Convention on Human Rights, Art.8 (2).see Art.6 of Commonwealth Convention on Human Rights and Fundamental Freedoms.

⁷⁷ African Charter on Human and People Rights (1981), Article 7(1)(b).

⁷⁸ Convention for the Protection of Human Rights and Fundamental Freedoms 1950,Art. 6(2).

2.1.2 The Rights to Due Process of Law

The phrase ‘Due process rights’ is elucidated in *Black’s Law Dictionary* that “the rights as to life, liberty, and property so fundamentally important as to require compliance with due-process standards of fairness and justice.⁸⁰” The most important principle, that no person shall be deprived of his life and liberty except according to the procedure established by law.⁸¹ The International Bill of Human Rights (UDHR), Article (3) declares that “Everyone has the right to life, liberty and security of person.⁸²” The principle is contained in Article 6, of the International Covenant on Civil and Political Rights that every human being has the inherent rights to life of every human being by law. No one shall be arbitrarily deprived of his life.⁸³

Article 9 of UDHR provides that “No one shall be subjected to arbitrary arrest, detention or exile.⁸⁴” The Article 6(2) of the ICCPR, adopted in 1966, lays down “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.⁸⁵” Further ICCPR, Article 6 (3) declares that “When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under

⁷⁹ Statute of the International Tribunal for the Former Yugoslavia, Art. 21, (3).

⁸⁰ Bryan A. Garner, *Black’s Law Dictionary* (West Publishing Co USA, 2009), 575.

⁸¹ S.C. Joshi, *Human Rights Concepts, Issues, and Laws* (New Delhi: Akansha Publishing House, 2006), 49.

⁸² UDHR, Art. 3.

⁸³ ICCPR, Art. 6(1)

⁸⁴ UDHR, Article 9.

⁸⁵ ICCPR, Art. 6 (2).

the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.⁸⁶ Under article 6(4) ICCPR, a person can seek concession in his punishment is as “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.”⁸⁷

Under this article some person due to under age, extreme old age or pregnant woman shall be immune from punishment. “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.”⁸⁸

Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.⁸⁹ Art.9 (1) of ICCPR describes the rights of liberty of a person that “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”⁹⁰ The 9 (3) of ICCPR adds further, anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.⁹¹

⁸⁶ ICCPR, Art. 6(3),

⁸⁷ *Ibid.*, Art. 6(4).

⁸⁸ ICCPR, Art. 6(5).

⁸⁹ *Ibid.*, Art. (6)(6).

⁹⁰ *Ibid.*, Art. 9(1).

⁹¹ *Ibid.*, Art. 9(3).

Nobody shall be arrested without lawful circumstances, otherwise he will be allowed to make legal proceedings against that under Article9 (4) of ICCPR “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”⁹²”

It is pertinent to mention here The Rome Statute of ICC that ‘A Person Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.’⁹³

Article 11 of ICCPR lays down the circumstances for incarcerated that no one shall be merely on the ground of inability to fulfill a contractual obligation.⁹⁴

At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

- (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.
- (b) The arrest of the person appears necessary:
 - (i) To ensure the person's appearance at trial.
 - (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings. Or

⁹² ICCPR, Article 9(4).

⁹³ The Rome Statute of the International Criminal Court, Article 55(1) (d).

⁹⁴ ICCPR, Article 11.

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the court and which arises out of the same circumstances.⁹⁵

2.1.3 The Right of Notice Promptly of the Charge/s and Confronting Witnesses/Evidence against him and Grounds of Arrest to be informed

The arrested person shall be informed of the reasons for his arrest as well as confronting witnesses against him. It is relevant to mention here Article 9 Clause 2 of ICCPR that anyone who is arrested shall be informed, on the spot, of the reasons for his arrest and shall be without delay informed of any allegation against him.⁹⁶ The Rome Statute Art.67 (a) provides the guarantees, in full equality that the accused once arrested, has the right to be informed immediately and in detail of the temperament, cause and content of the accusation, in a language which the accused fully understands and speaks.⁹⁷

ICCPR 14 (3) renders to the accused in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.⁹⁸ American Convention on Human

⁹⁵ The Rome Statute of the International Criminal Court, article 58(1)(a), and (b) Sub Para (i) ,(ii) ,(iii).

⁹⁶ ICCPR, Article. 9 (2).

⁹⁷ Rome Statute of ICC, Article,67(1)(a).

⁹⁸ ICCPR, Art. 14(3)(a).

Rights says that anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.⁹⁹

To have the free assistance of an interpreter if he cannot understand or speak the language used in court.¹⁰⁰ European Convention for the Protection of Human rights and Fundamental Freedoms article 6, Clause 3 Para (a) deals the rights of accused to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.¹⁰¹ Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.¹⁰²

Above mentioned convention laid as Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.¹⁰³

This American Convention also deals that No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for non fulfillment of duties of support.¹⁰⁴ Punishment shall not be extended to any person other than the criminal.¹⁰⁵

⁹⁹ American Convention on Human Rights 1969,Art.7(4).

¹⁰⁰ ICCPR, Art. 14(3)(f).

¹⁰¹ European Convention for the Protection of Human rights and Fundamental Freedoms article6,(3) (a).

¹⁰² European Convention for the Protection of Human rights and Fundamental Freedoms Article5,(3).

¹⁰³ American Convention on Human Rights,Article 7(5).

¹⁰⁴ American Convention on Human Rights Art. 7(7).

¹⁰⁵ *Ibid.*,5(3).

In the determination of any charge against the accused, shall be entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.¹⁰⁶ Accused shall be entitled for the prior notification in detail to the accused of the charges against him¹⁰⁷

2.1.4 The Right to Immediate access to the Counsel of Choice for legal

Defense

The accused has the right of prompt access to the legal practitioner of his own free consent for legal consultation and defense in trial. Any person accused of an offence before a criminal court has the right to be defended by a pleader of his choice.¹⁰⁸ In case where the accused has no means of engaging a pleader, it is incumbent on the court to assign a pleader for his or her defense at state expense.¹⁰⁹ Subject to the Miranda rights the accused has the right to have an attorney present during investigation and also any future questioning further must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today.¹¹⁰

¹⁰⁶ The accused has the rights of which he shall be informed prior to being questioned: To have legal support of the person's choosing, or, if the person does not have legal support, to have assistance assigned to him, in any case where the benefit of justice so

¹⁰⁶ Statute of the International Tribunal for the Former Yugoslavia Article21(4)(a). see also Statute of the International Criminal Tribunal for the Rwanda, art. 20(4)(a).

¹⁰⁷ American Convention on human Rights, Art. 8(2)(b).

¹⁰⁸ Prakash Talwar, *Human Rights*(Delhi: Isha Books D-43,Prithviraj Road, Adarsh Nagar,Delhi-110033,2006),128.

¹⁰⁹ *Ibid.*,128.

¹¹⁰ http://usgovinfo.about.com/cs/miranda_rights ,(Accessed:26/06/2012).

require, and without payment by the person in any such case if the person does not have satisfactory means to pay for it.¹¹¹ It is significant to cite here that to be questioned in the presence of legal supporter unless the person has willingly waived his right to counsel.¹¹² Under Art.14 (3) (d) of ICCPR it has been enshrined that to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.¹¹³

Art.8(2)(e) of ACHR 1969, refers that the inalienable right to be assisted by counsel provided by the state, if the accused does not defend himself personally or engage his own counsel within the time period established by law.¹¹⁴ It is related to talk about here that the right of the accused to be assisted free of cost by a translator or interpreter, provided he does not understand or does not speak the language of the court.¹¹⁵

European Convention, declares a person criminally charged has the right that “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given if free when the interests of justice to require.¹¹⁶” This convention further says that accused has a right to have the free assistance of an interpreter if he cannot understand or speak the language used in court.¹¹⁷

¹¹¹ The Rome Statute of the International Criminal Court, Article55 (2)(c).

¹¹² *Ibid*, Art.55 (2)(d).

¹¹³ ICCPR, Article14 (3)(d).

¹¹⁴ American convention on Human Rights 1969,Article8(2) (e).

¹¹⁵ *Ibid*, Article 8(2) (a).

¹¹⁶ European Convention for the Protection of Human rights and Fundamental Freedoms article6, (3)(c).

¹¹⁷ *Ibid*, Art.6, Clause (3)(e).

2.1.5 The Right of Bail Bond, Surety and to Seek Remedies, for unlawful Arrest, Detention, and Confinement

According to Black's law Dictionary the word 'bail means' as noun a security such as cash or a bond; required by a court for the release of a accused/prisoner who must appear in court at a future. And as verb it means that to obtain the release of accused by providing security for a future appearance in court.¹¹⁸ Bail bond means a bond given to a court by an accused's surety to guarantee that the defendant will duly appear in court in the future.¹¹⁹

Article 9(4) of ICCPR provides that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.¹²⁰

Under Article 9, of ICCPR stressing the concerned authority to promptly produce the arrested, detained person before the magistrate for judicial proceedings, that anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.¹²¹ It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise,

¹¹⁸ Bryan A. Garner, *Black's Law dictionary* (Thomson West: West Publishing, 2009),160.

¹¹⁹ *Ibid.*, 200.

¹²⁰ ICCPR,9 (4).

¹²¹ ICCPR, 9 (3)

for execution of the judgment.¹²² Article 9(5) of the ICCPR, embodies remedy that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.¹²³

Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.¹²⁴ European Convention declares that everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.¹²⁵ Everyone who has been the victim of arrest or detention in contravention of the law, of European Convention, shall have an enforceable right to compensation.¹²⁶

A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

(a) The warrant applies to that person;

(b) The person has been arrested in accordance with the proper process; and

¹²² *Ibid.*, 9 (3).

¹²³ *Ibid.*, 9 (5).

¹²⁴ American convention on Human Rights, Art.7(6).

¹²⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, Article5(4).

¹²⁶ *Ibid.*, Art.5(5).

(c) The person's rights have been respected.¹²⁷

2.1.6 Freedom from compulsory self Incrimination, to confess Guilt, Testify Crime, and to Remain Silent also Freedom from Coercion, and Threat

The Latin maxim '*Nemo tenetur seipsum accusare*' that no man can be compelled to incriminate himself. This Latin maxim expresses that everyone is free from to betray himself. The accused are protected from self-incrimination. This protection pre-empts torture and other forms of coercion by rendering the confessions or incriminating testimony inadmissible in court.

Art. 55 of ICC Rome Statute laid down that a person shall not be subjected to any form of coercion, duress or threat.¹²⁸ According to ICCPR Art.14 (3) (g) No one to be forced to be a witness against himself or to confess guilt.¹²⁹

The Statute of ICC Art.55, Clause2 Para b, claims that to remain silent, without such silence being a consideration in the determination of guilt or innocence.¹³⁰

A person shall not be compelled to incriminate him or herself or to confess guilt.¹³¹ According to Miranda Rights the accused has the right to remain silent. "At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent."¹³² The Miranda rights do

¹²⁷ The Rome Statute of the International Criminal Court , Art.59 (2).

¹²⁸ The Rome Statute of the International Criminal Court, Art. 55(1)(b).

¹²⁹ ICCPR, Article 14(3)(g).

¹³⁰ The Rome Statute of the International Criminal Court, Art.55,Cl (2)Para(b).

¹³¹ Rome Statute of International Criminal Court, Art. (55)Cl (1)Para(a).

¹³² http://usgovinfo.about.com/cs/mirandarights/a/miranda_2.htm(Accessed: 25/06/2012).

not protect accused from being arrested, only from incriminating yourself during questioning. All police need to legally arrest a person is "probable cause" -- an adequate reason based on facts and events to believe the person has committed a crime.¹³³ Police are required to "Read him his (Miranda) rights," only before interrogating a suspect: While failure to do so may cause any subsequent statements to be thrown out of court, the arrest may still be legal and valid.¹³⁴

Also without reading the Miranda rights, police are allowed to ask routine questions like name, address, date of birth, and Social Security number necessary to establishing a person's identity. Police can also administer alcohol and drug tests without warning, but persons being tested may refuse to answer questions during the tests.¹³⁵

ACHR, Article 8, lays down in the following words: Being accused this is his right not to be compelled to be a witness against himself or to plead guilty.¹³⁶ Article 8(2) of American Convention on Human Rights lays down the right of accused that accused shall not be compelled to be a witness against himself, incriminate himself or to plead guilty.¹³⁷

¹³³ *Ibid.*,

¹³⁴ *Ibid.*,

¹³⁵ *Ibid.*,

¹³⁶ American Convention on Human Rights (1969) Article 8, Clause(2) Paragraph(g).

¹³⁷ *Ibid.*, Article 8(2)(g).

2.1.7 The Right to Protect Honor and Reputation

An accused is presumed to be innocent until proved guilty. According to the nature of humanity society, wants to promote the honor of every one. The pretrial publicity is harmful to private safety and image also disturbs the moral right, public order and national interest. So it is not acceptable that the accused be to defame. If someone makes such publicity it amounts to insult and on the request of accused the court may award compensation to him.

Under¹⁴ (1) of ICCPR it has been elaborated that ...the press and the public may be expelled from all or part of a pre-trial and during trial for reasons of morals, public safety or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.¹³⁸ The interest of juvenile accused otherwise requires or the proceedings concern marital disputes or the guardianship of children may be kept away from pre-judicial pre trial publicity.¹³⁹ Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal statute.¹⁴⁰

UDHR, protects the honor and dignity, provides him preservation from degrading treatment of every one, either what is his position and status. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled

¹³⁸ ICCPR, Art.14 (1).

¹³⁹ *Ibid.*, Art. 14 (1)

¹⁴⁰ African Charter on Human and Peoples' Rights, Art. 5.

to equal protection against any discrimination... and against any provocation, incitement to such discrimination.¹⁴¹

2.1.8 Protection against Torture, other Cruel, Inhuman or Degrading Treatment or Punishment

The literal meaning of torture is 'the act of causing somebody severe pain, mental or physical suffering in order to punish them or make them say or do something.'¹⁴² The accused shall be protecting from torture and other cruel, inhuman or degrading treatment or punishment, self-incrimination in each stage.

Art.1(1)of CAT explained the term torture in these words: The term torture means any act by which severe pain or suffering ,whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions.¹⁴³

Art.5 of UDHR comments against torture that every one shall be free from torture or to unkind, brutal or degrading behavior or punishment.¹⁴⁴ "International customary law

¹⁴¹ UDHR, Art.7.

¹⁴² A.S Hornby ,*Oxford Advanced learner's Dictionary*(Oxford: Oxford University press,Ed.6th,2001),1372.

¹⁴³ Convention Against Torture (CAT)and other cruel , inhuman or degrading Treatment or punishment, Part (I)Article1(1).

¹⁴⁴ UDHR, Art.5.

under CAT, undertake to prevent in any territory torture, other acts of cruel inhuman or degrading treatment or punishment, subject to law of international instrument and national law or which relates to extradition or expulsion.¹⁴⁵

Article 7 of ICCPR prohibits torture and cruel, inhuman or degrading punishment. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, accused shall not be subjected without his free consent to medical or scientific test.¹⁴⁶ Art. 55(1) (b) of ICC Statute lays down that “A person Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment.¹⁴⁷ All forms of exploitation and degradation of man particularly...torture, cruel, inhuman, or degrading punishment and treatment shall be prohibited.¹⁴⁸

2.1.9 Special Privileges of Juvenile accused, and Adults Accused shall not be kept with Convicts

The international criminal law observes that the accused is to be kept away from convict. Here ICCR enshrines that the accused shall,(save in exceptional circumstances), be segregated from convicted persons because of it is presumed that he shall be innocent till his guilty proved, and shall be subject to separate treatment apposite to their status and nature as un convicted persons.¹⁴⁹

¹⁴⁵ Convention Against Torture (CAT)and other cruel , inhuman or degrading Treatment or punishment,1984.Art. 16,Cl(1)and (2).

¹⁴⁶ ICCPR,Article7.

¹⁴⁷ The Rome Statute of the International Criminal Court , Art. (55) (1)(b).

¹⁴⁸ African Charter on Human and Peoples' Rights , Art. 5.

¹⁴⁹ ICCPR, Article 10(2)(a).

Under art.5(4) of ACHR,1969 the Accused persons shall, be separated from convicted persons, and shall be dealt separately, appropriate to their status as unconvicted persons.¹⁵⁰ Minors while subject to criminal proceedings shall be segregated from adults and brought before specialized courts, as speedily as possible, so that they may be treated in accordance with their status as minors.¹⁵¹

Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.¹⁵²

Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.¹⁵³

Law always looks to the nature of the crime as well as to the age and physical health of the accused. In law the age play very pivotal role, where it causes mens rea and actus rea.

Art.37 (b) of CRC provides that no child shall be deprived of his liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.¹⁵⁴

A child /juvenile accused deprived of liberty shall be treated with kindness and admiration for the inherent dignity of the human person, and in a manner which takes into account the requirements of persons of his age. especially, every child deprived of liberty

¹⁵⁰ American Convention on Human Rights 1969,Art. 5(4).

¹⁵¹ *Ibid.*, Art. 5(5).

¹⁵² ICCPR, Article 10(2)(b).

¹⁵³ *Ibid.*, Article. 10 (3).

¹⁵⁴ CRC, Article 37(b)

shall be segregated from adults accused unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his family through communication and visits, save in exceptional cases.¹⁵⁵

Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.¹⁵⁶

Capital Punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age, nor shall it be applied to pregnant women.¹⁵⁷ In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.¹⁵⁸ International criminal law recognize the right of every child/juvenile alleged as, accused of, or recognized as having infringed the penal law to be treated in a more reliable with the promotion of the child's sense of self-respect and value, which promotes the child's respect for the human rights and which takes into account the child's age and the desirability of reinforcing the child's reintegration.¹⁵⁹

International instruments in particular CRC Art.40(2)(a) ensure that no child shall be alleged as, be accused of, or recognized as having infringed the penal law, that were not prohibited by national or international law at the time they were committed.¹⁶⁰ Under Art 40, Clause (2) Para (b) (i) of CRC covers, every child/juvenile accused to be presumed

¹⁵⁵ CRC, Article 37(c).

¹⁵⁶ *Ibid.*, Art. 37 (d).

¹⁵⁷ American Convention on Human Rights, Article(4) Paragraph(5).

¹⁵⁸ ICCPR, Art. 14 (4).

¹⁵⁹ CRC, Art.40 (1).

¹⁶⁰ *Ibid.*, Art.40 (2)(a).

innocent until proven guilty according to law.¹⁶¹ The Juvenile accused is to be promptly informed with and directly of the charge of allegations against him and, if suitable, through his parents or lawful guardians, and to have legal or other appropriate assistance in the preparation and appearance of his defense.¹⁶² Every child alleged or Juvenile accused to have the matter determined without delay by a capable, independent and neutral judicial body in a fair hearing, in the presence of legal appropriate assistance and, taking into account his age or circumstances, his parents or guardians.¹⁶³

International criminal law guaranteed that juvenile accused/child alleged, shall not to be compelled to give evidence or to plead guilty; to examine or have examined adverse witnesses and to get the participation and examination of witnesses on his behalf under conditions of equality.¹⁶⁴

CRC Art.40 (2) (b) (vi), furnishes that to have the free assistance of an interpreter is to be provided if the child alleged/juvenile accused cannot understand or speak the language used during trial or before trial.¹⁶⁵

During proceedings the privacy of child/juvenile accused is to be fully respected.¹⁶⁶ Criminal law shall seek to promote the establishment of laws, applicable to children alleged /juvenile accused through CRC, Art. 40 Clause 3, Paragraph A, provides the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.¹⁶⁷

¹⁶¹ CRC, Art, 40 (2) (b)(i).

¹⁶² *Ibid*, Art, 40 (2) (b) (ii)

¹⁶³ *Ibid*, Art. 40 (2) (b) (iii).

¹⁶⁴ *Ibid*, Art. 40 (2) (b)(iv).

¹⁶⁵ *Ibid*, Art. 40 (2) (b)(vi).

¹⁶⁶ *Ibid*, Art. 40 (2)(b)(vii).

¹⁶⁷ *Ibid*, Art. 40 (3)(A).

CRC lays down that whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal protections are entirely appreciated.¹⁶⁸ He shall enjoys a variety of dispositions, such as care, supervision and administration orders; counseling; probation; foster care; education and other alternatives to institutional care , to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the charges of offence.¹⁶⁹

Like adult accused the child/juvenile accused below eighteen years of age shall not be subjected to torture or other cruel, inhuman or degrading treatment or punishment. He shall not get capital punishment nor life imprisonment... be awarded for offences committed. by persons below eighteen years of age.¹⁷⁰

2.1.10 Right to a Trial, without Undue delay and must be within Proper Time (Reasonable Time)

The accused has the right to be tried without delay, and the general rules also says that an arrested person be brought to the judicial officer for proceedings as early as possible. Anyone arrested or detained on a criminal charge shall be presented rapidly before a judge or other officer authorized by law to perform judicial power and shall be entitled to trial within a reasonable time or to release him.¹⁷¹ It is against the general rule that accused awaiting trial shall be seized in custody, but release may be subject to

¹⁶⁸ CRC, Art. 40(3), B.

¹⁶⁹ *Ibid.*, Art. 40 (4).

¹⁷⁰ *Ibid.*, Art.37(a).

¹⁷¹ ICCPR, Art. 9(3).

guarantees to appear for trial , at any other stage of the trial, and, should occasion arise, for execution of the judgment.¹⁷²

International criminal law promotes the statement through the Rome Statute ensures that a person shall not be detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the court shall consider releasing the accused, with or without conditions.¹⁷³

Art, 14(3)(c) of ICCPR provides that every one charged with a criminal offence shall have the right to be tried without undue delay.¹⁷⁴ In the determination of any charge against the accused, shall be entitled to be tried promptly in full equality.¹⁷⁵

The accused has the right to present him before court for trial along with necessary documents and evidences within reasonable and adequate time. Accused arrested or detained shall have the right To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.¹⁷⁶

Art.60 (1) of the Rome Statute of ICC supply statement about the accused that the free trial court shall satisfy itself that the accused has been informed of the crimes which he is alleged to have committed, upon the surrender of the person to the Court, or the accused's appearance before the Court voluntarily or pursuant to a summons, including the right to apply for interim release pending trial.¹⁷⁷ It is elaborated that on the issuance

¹⁷² ICCPR, Art.9(3).

¹⁷³ The Rome Statute of International Criminal Court , Art. 60(4).

¹⁷⁴ ICCPR, Art.14 (3) (c).

¹⁷⁵ International Tribunal for the Former Yugoslavia since, Art.21(4)(c).

¹⁷⁶ ICCPR, Art. 14 (3) (b).

¹⁷⁷ The Rome Statute of International Criminal Court , Art. 60(1).

of warrant of arrest, the accused may apply for temporary release pending trial. The accused shall continue to be detained by the pre-trial court satisfaction. If it is not so satisfied, the Pre-Trial Court shall release him, with or without conditions.¹⁷⁸

The Charge of allegations shall be confirmed before trial within a reasonable time after the accused' s surrender or voluntary appearance before the court, the pre trial court shall hold a hearing to confirm the charges on which the prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his counsel.¹⁷⁹ The accused shall be provided within a reasonable time before the hearing, with a copy of the document file containing the charges on which the prosecutor intends to bring the accused to trial.¹⁸⁰

It is elucidated in the Rome statute that the person shall, be informed within a reasonable time before the hearing, of the evidence on which the Prosecutor intends to rely at the hearing. The free trial Court may issue orders regarding the disclosure of information for the purposes of the hearing.¹⁸¹

¹⁷⁸ *Ibid*, Article 60(2).

¹⁷⁹ The Rome Statute of International Criminal Court Art. 61(1).

¹⁸⁰ *Ibid.*, Art.61(3)(a).

¹⁸¹ *Ibid.* ,Art. 61(3)(b).

2.2 The Rights of Accused during Trial

2.2.1 Presumption of Innocence

The accused shall be presumed innocent until proven guilty. This legal maxim applies on the three stages of accused. It is the basic and distinguished rights and supports him. All other rights and privileges come under this maxim. If the accused not considered innocent, he would have lost his all other rights. The court shall not convict the accused until to satisfy his guilty. The ICC Statute also support and states that in order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.¹⁸² ITC for the Former Yugoslavia under 21(3) deals that the accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.¹⁸³ The accused shall be equally treated before the law. He has the right to be dealt with out any discrimination and assault. No law deprives him from the fold of legal protection and support. Universal Declaration of Human Rights declares, everyone has the right to recognition everywhere as a person before the law.¹⁸⁴ All are equal before the law and are entitled without any discrimination to equal protection of the law. Art.7 of UDHR, lays down that all are entitled to equal protection against any discrimination.¹⁸⁵

¹⁸² The Rome Statute of the International Criminal Court Article66(3).

¹⁸³ Statute of the International Tribunal for the Former Yugoslavia, Article21(3)
see also Article 20(3) of Statute of the International Criminal Tribunal for the Rawanda.

¹⁸⁴ UDHR, Article6.

¹⁸⁵ UDHR, Article7.

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.¹⁸⁶ No one shall be subjected to arbitrary arrest, detention or exile.¹⁸⁷

Statute of the International Criminal Tribunal for the Former Yugoslavia states that Rights of accused, all persons shall be equal before the International Tribunal.¹⁸⁸

2.2.2 Right to a Fair, Speedy and Public Trial by Competent and

Independent Court

It is very comprehensive topic. The law looks to the full equality of parties. On the bases of this statement the accused has the right that trial must be fair and speedy by the competent and lawful court. The judicature system wants to determine the true path for justice. The court ascertains for equal opportunities of rights, provide to the both parties.

Art.10 of UDHR caters that everyone is entitled in full equality to a fair and public hearing by an independent and impartial court, in the determination of his rights and obligations and of any criminal charge against him.¹⁸⁹

Art.14 (1) of ICCPR confers that the accused and prosecution are equal in eye of law and shall be dealt equal in the courts and tribunals. In the determination of any criminal charge against him, he shall be entitled to a fair and public hearing by a competent, independent and impartial also regularly constituted court previously established by law. So the Trial and Judgment shall be hold publicly. But the press, print and public sometimes expels from all or part of the trial in the moral interests, public benefit or

¹⁸⁶ UDHR, art.8.

¹⁸⁷ *Ibid.*, Art. 9.

¹⁸⁸ Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 21(1).

¹⁸⁹ UDHR, Article10.

national protection and international security, where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.¹⁹⁰ Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.¹⁹¹

Rome Statute describes that the court during Trial shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due consideration for the protection of victims and witnesses.¹⁹² ICCPR Art.16 provides that everyone shall have the right to recognition everywhere as a person before the law.¹⁹³ The ICC Rome Statute supplements that; the accused shall be entitled to a public and to a fair hearing conducted impartially.¹⁹⁴

Art.67 of Rome Statute of the ICC explaining the rights of accused providing the following guarantees, in full equality, as the part of fair and expedient trial. The accused is to be informed on time and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks.¹⁹⁵

He has the right to have sufficient time and facilities for the preparation of the defense and to communicate freely with counsel of the accused's choosing in self-confidence¹⁹⁶ and to be tried without undue delay.¹⁹⁷

¹⁹⁰ ICCPR 14 (1).

¹⁹¹ *Ibid.*, Article 15(2).

¹⁹² Rome Statute of The International Criminal Court, 1998 Article 64(2).

¹⁹³ ICCPR, Art.16.

¹⁹⁴ Rome Statute of The International Criminal Court, Article 67(1).

¹⁹⁵ *Ibid.*, Article 67(1)(a).

¹⁹⁶ *Ibid.*, Art. 67(1)(b).

¹⁹⁷ *Ibid.*, Art. 67(1)(c).

He has the right to provide the assistance of counsel free of cost if the accused lacks sufficient means to pay for it and the court thinks fit so, for the interest of justice.¹⁹⁸

The accused has the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The accused shall also be entitled to raise defenses and to present other evidence admissible under the law and procedure.¹⁹⁹

He also has the right to take the assistance of a competent interpreter and such translations as are essential to meet the requirements of fairness, without payment, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks²⁰⁰ He shall be free from compulsory incrimination, statement under duress, coercion, threat, confess guilt, testify crime and to remain silent.²⁰¹

He has the right to make an unsworn verbal or written statement in his defense.²⁰² Further any reversal burden of proof or any onus of rebuttal shall not be imposed on him.²⁰³

In addition to any other disclosure , the Prosecutor shall, disclose to the defense evidence in the Prosecutor's possession or control which he believes shows or tends to show the innocence of the accused, or to mitigate and alleviate the guilt of the accused, or which may affect the credibility of prosecution evidence.²⁰⁴

¹⁹⁸ Rome Statute of The International Criminal Court Art. 67(1)(d).

¹⁹⁹ *Ibid.*, Art. 67(1)(e).

²⁰⁰ *Ibid.*, Art. 67(1)(f).

²⁰¹ *Ibid.* , Art. 67(1)(g).

²⁰² *Ibid.*, Art. 67(1)(h).

²⁰³ *Ibid.*, Art. 67(1)(i).

²⁰⁴ *Ibid.*, Art. 67(2).

ICTY Statute furnishes that a charges against, the accused, he shall be ought to have a fair, speedy and public hearing, subject to the provision of law.²⁰⁵

Under Art.6(1) of ECPHR,1905, elucidate that in the pursuance of his civil rights and charge against him accused is entitled to a fair and public trial within a reasonable time by an independent and impartial court, constituted by law. When the court feels any prejudice regarding public trial and judgment, then the judge may exclude the press and public for the best interest of moral, public and national protection as the court requires.²⁰⁶ In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to article 21 of the Statute.²⁰⁷

2.2.3 The Right to be heard the Trial in the presence of the accused

This legal maxim '*Audi alteram partem*' means No man shall be condemned unheard. The Rome statue pursue the presence of accused in these words: "The accused shall be present during the trial."²⁰⁸

ICCPR presents that he must have the free assistance of an interpreter if he cannot understand or speak the language used in court.²⁰⁹ The Trial Court may remove the accused, if he continues to disrupt the trial and shall make provision for him to observe the trial and instruct counsel from outside the courtroom, if required. Such measures shall be taken only in exceptional cases after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.²¹⁰

²⁰⁵ The Statute of the International Criminal Court For Former Yugoslavia,Art.21(2).

²⁰⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, Art.6(1).

²⁰⁷ Statute of the International Criminal Tribunal for Rwanda 1994,Article20(2).

²⁰⁸ Rome Statute of The International Criminal Court, 1998 Art. 63(1).

²⁰⁹ ICCPR, Art.14 (3) (f).

²¹⁰ Rome Statute of the International Criminal Court, Art. 63(2).

The accused shall be entitled to be tried in his presence, and to defend himself in person or through counsel of his own choosing; to be informed, if he does not have so, of this right; and to have counsel assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he does not have sufficient means to pay for it.²¹¹

2.2.4 The Right to have Sufficient Time, Means and Facilities for the Preparation of Reasonable Defense

In the determination of any criminal charge the accused, shall be entitled to have adequate time and facilities for the preparation of his reasonable defense and to communicate with counsel of his own choosing.²¹²

European Convention for the Protection of Human Rights and Fundamental Freedoms declares that the right of accused to have adequate time and facilities for the preparation of his defense.²¹³ Art.8 ACHR, has given the right of adequate time and means for the preparation of defense to accused of a criminal offence.²¹⁴

Subject to article 63, accused to be present at the trial, to conduct the defense in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.²¹⁵

²¹¹ Statute of the International Criminal Tribunal for Rwanda and Neighboring States,Art. 20(4)(d) Art. 21(4)(d).

²¹² Statute of the International Criminal Tribunal for Rwanda and Neighboring States,Art.14(3)(b).

²¹³ European Convention for the Protection of Human Rights and Fundamental Freedoms , Art.6(3)(b).

²¹⁴ American Convention on human Rights ,Art.8(2)(C).

²¹⁵ Rome Statute of the International Criminal Court, Art. 67 (1)(d).

To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defenses and to present other evidence admissible under this Statute.²¹⁶

To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks²¹⁷

To have adequate time and facilities for the preparation of the defense and to communicate freely with counsel of the accused 's choosing in confidence.²¹⁸ In the determination of any charge against the accused, he shall be entitled to have adequate time and facilities for the preparation of his or her defense and to communicate with counsel of his or her own choosing.²¹⁹

²¹⁶ *Rome Statute of ICC*, Art. 67(1)(e).

²¹⁷ *Ibid.*, Art. 67(1)(f).

²¹⁸ *Ibid.*, Art. 67(1)(b).

²¹⁹ Statute of the International Criminal Tribunal for Rwanda and Neighbouring States., Also see: article 20(4)(b). See also, Statute of the International Tribunal for Former Yugoslavia Article 21(4)(b).

2.2.5 The Right of Freedom from Ex-Post facto Laws and Protection

against Retrospective Punishment

Black's Law Dictionary defined the '**Ex Post Facto Law**' a law that applies retroactively, esp. in a way that negatively affects a person's rights, as by criminalizing an action that was legal when it was committed.²²⁰

A legal maxim '*Nova constitutio formam imponere debet, non praeteritis*' means A new law ought to be prospective, not retrospective, in its operation. No person can be accused and convicted of an offence for an act which was not an offence under the law in force on the date when it was committed.²²¹

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit there from.²²²

The prevention of ex-post facto operation of criminal law has been enshrined in Article 11(2) of the UDHR enshrines that no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.²²³

This legal maxim has been taken from the Rome Statute is as under:

²²⁰ Bryan A Garner ,*Black's Law Dictionary*,(ST. Paul,Minn.,USA,1999)Seventh Edition ,Page601.

²²¹ S.C. Joshi, *Human Rights Concept, Issues, and Laws* (New Delhi: Akansha Publishing House, 2006),49.

²²² American Convention on Human Rights, Art. 9.

²²³ UDHR, Art. 11(2).

(1) ***Nullum crimen sine lege , (Nulla Crimen Sine Lege) Nun Bis In Idem:*** It means that a person shall not be criminally responsible unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.²²⁴ Any ambiguity found in crime during investigation, prosecution or conviction, the definition of a crime shall be interpreted in favor of the accused.²²⁵ This statement shall not affect the characterization of any conduct as criminal independently.²²⁶

(2) ***Nulla poena sine lege:*** A person convicted by the Court may be punished only in accordance with the law.²²⁷

(3) ***Non-retroactivity ratione personae:*** No person shall be criminally responsible for conduct prior to the entry into force of the law.²²⁸

In the event of a change in the law applicable to a given case prior to a final judgment, the law more favorable to the person being investigated, prosecuted or convicted shall apply.²²⁹

ICCPR lays down that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.²³⁰

²²⁴ Rome Statute of the ICC, Article 22(1).

²²⁵ *Ibid.*, Art. 22(2).

²²⁶ *Ibid.*, Art. 22(3).

²²⁷ *Ibid.*, Art. 23

²²⁸ *Ibid.*, Art. 24(1).

²²⁹ *Ibid.*, Art. 24(2).

²³⁰ ICCPR, Art.15(1).

It further describes that nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.²³¹

ECPHR and Fundamental Freedoms, says no punishment be awarded without law. Article7 of ECPHRFF provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed then one that was applicable at the time the criminal offence was committed.²³²

This shall not prejudice the trial and punishment of any person for any act or which at, the time when it was committed, was criminal according to the general principals of law recognized by civilized nations.²³³ African Charter on Human and People Rights declares that, no one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed²³⁴

²³¹ *Ibid.*, Art.15(2).

²³² European Convention for the Protection of Human Rights and Fundamental Freedoms1950, Art.7(1).

²³³ European Convention for the Protection of Human Rights and Fundamental Freedoms1950 ,Art. 7(2).

²³⁴ African Charter on Human and People Rights1981,Art.7(2).

2.2.6 The Right to Ensure Protection and Safety of the Victims and Witnesses and Their Participation in the Proceedings/Trial

The concept of international criminal law covers the principles of protection and safety to accused, prosecutor and witnesses on the attending of court.

Under Art.68(1) of Rome Statute it has been discussed that it is the Court responsibility, shall provide the protection and safety, of the bodily, mental and emotional well-being, dignity and privacy of victims and witnesses and accused. In so doing, the Court shall have regard to all relevant factors, including age, gender and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.²³⁵ The court shall, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness.²³⁶

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.²³⁷

²³⁵ Rome Statute of The International Criminal International Court,1998 Art. 68(1).

²³⁶ *Ibid.*, Art.68(2).

²³⁷ *Ibid.*, Art.,68(3).

Where the disclosure of evidence or information may give to the grave endangerment of the safety of a witness, the Prosecutor may, for the purposes of any proceedings conducted prior to the initiation of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.²³⁸ The court may take necessary measures in respect of the protection of its servants or agents and the protection of confidential or sensitive information.²³⁹

2.2.7 The right to Examine Prosecution witnesses and to obtain the Attendance

Article 67(e) provides, to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against. The accused shall also be entitled to raise defenses and to present other evidence admissible under the law.²⁴⁰

The right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may enlighten the facts²⁴¹ to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.²⁴² ECPHR provides the rights of accused that to examine or have examined

²³⁸ Rome Statute of ICC, Art. 68(5).

²³⁹ *Ibid.*, Art.,68(Paragraphs(6).

²⁴⁰ *Ibid*, Art. 67(e).

²⁴¹ American Convention on Human Rights, Art. 8(2)(f).

²⁴² ICCPR, Article 14(3)(e).

witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.²⁴³

2.2.8 The Right to Confirmation of the charges before trial

The accused has the right to confirm the charges before trial; otherwise he has opportunity to rebut it. Accused within a reasonable time after the surrender or voluntary appearance before the Court, the pre-trial court shall hold a hearing to confirm the charges. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his or her counsel.²⁴⁴

The pre trial court may hold a hearing in the absence of the accused, provided the accused waives his right to be present, while represented by counsel where the court determines that it is in the interests of justice.²⁴⁵

The accused fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held. In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.²⁴⁶

The accused shall be presented before court with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial within reasonable time.²⁴⁷ He shall be informed of the evidence on which the Prosecutor intends to rely at the hearing. The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.²⁴⁸

²⁴³ European Convention for the Protection of Human Rights and Fundamental Freedoms ,Article, 6(3)(d).

²⁴⁴ Rome Statute of The International Criminal Court, Article, 61(1).

²⁴⁵ *Ibid.*, Art. 61(2)(a).

²⁴⁶ *Ibid.*, Art.61(2)(b).

²⁴⁷ *Ibid.*, Art. 61(3)(a).

²⁴⁸ *Ibid.*, Art. 61(3)(b).

Prior to the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charge of allegations. The accused shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Court of the reasons for the withdrawal.²⁴⁹ At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.²⁵⁰

At the hearing, the accused has the options of rights to object the charges framed to him, challenge the evidence made by witness, also present evidence in his own favor.²⁵¹ The Pre-Trial Court shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

- (1) The pre-trial court shall confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Court for trial on the charges as confirmed.²⁵²
- (2) The pre-trial court shall decline to confirm those charges in relation to which it has determined that there is insufficient evidence.²⁵³
- (3) The pre-trial court shall adjourn the hearing and may request the Prosecutor to provide further evidence or conducting further investigation with respect to a particular charge.²⁵⁴

²⁴⁹ *Rome Statute of International Criminal Court*, Art.61(4).

²⁵⁰ *Ibid.*, Art.61(5).

²⁵¹ *Ibid.*, Art.61(6)(a)(b)(c).

²⁵² *Ibid.*, Art. 61 (7)(a).

²⁵³ *Ibid.*, Art.61(7)(b).

(4) The pre-trial court may amend a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.²⁵⁵

Where the Pre-Trial Court declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.²⁵⁶

After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.²⁵⁷

Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.²⁵⁸

Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.²⁵⁹

²⁵⁴ *Rome Statute of International Criminal Court*, Art.6, 1(7)(c)(i).

²⁵⁵ *Ibid.*, Art. 61(7)(c)(ii).

²⁵⁶ *Ibid.*, Art. 61(8).

²⁵⁷ *Ibid.*, Art. 61(9).

²⁵⁸ *Ibid.*, 61(10).

²⁵⁹ *Ibid.*, Art .61(11).

2.4 The Post-Trial Rights of accused

2.3.1 Right to a Deliberated and Reasoned Judgment

Black's Law Dictionary defines the word judgment as a 'court's final determination of the rights and obligations of the parties in a case. The term judgment includes an equitable decree and any order from which an appeal lies.²⁶⁰

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.
2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.
3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.
4. The deliberations of the Trial Chamber shall remain secret.
5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.²⁶¹

²⁶⁰ Bryan A. Garner, *Black's Law Dictionary* (Thomson West: West Publishing, 2009), 918.

The judgment shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.²⁶²

2.3.2 Right to Appeal and Revision

Black's Law Dictionary states the term 'appeal' that a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority.²⁶³

In addition to all the measures that protect the full rights and privileges of the accused during investigations and while standing trial, the international criminal law also guarantees and ensures the accused the right to appeal the Court's decision in the event he is convicted. The word "appeal" means the right of carrying a particular case from an inferior to a superior court with a view to ascertain whether the judgment is sustainable. An appeal is a creature of statutes and only exists where expressly given. Where the right of appeal is not exercised, no proceedings by way of revision can be entertained. During the proceedings, every person is entitled, with full equality to the right to appeal, review and revision the judgment to a higher court.²⁶⁴

Appeal against decision of conviction or against sentence maybe made ,is laid down in the Statute of ICC.Art81para1(b), provides that "The convicted person, or the prosecutor on the behalf of accused may make an appeal against the decision of the court in accordance with the rules of procedure and evidence on any of the following grounds:

(i) Procedural error,

²⁶¹ Rome Statute of The International Criminal Court, Art.74.

²⁶² Statute of the International Tribunal for the Former Yugoslavia Article 23(2)

²⁶³ Bryan A. Garner, *Black's Law Dictionary* (Thomson West: West Publishing, 1999).Page94.

²⁶⁴ American Convention on Human Rights, Article 8(2)(h).

(ii) Error of fact,

(iii) Error of law, or

(iv) Any other ground that affects the fairness or reliability of the proceedings or decision.²⁶⁵

The accused can make a petition to the appellate court on the imbalance and contradiction between the sentence and the nature of crime. Art.81 (2)(a), of the ICC Statute that a sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the convicted person on the ground of disproportion and inconsistency between the crime and the sentence.²⁶⁶

Under Art.81(2)(b) of the Rome Statute it has been described as: if on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the convicted person to submit grounds, and may render a decision on conviction in accordance with law.²⁶⁷ The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence.²⁶⁸

81(3) (b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released.²⁶⁹

In case of an acquittal, the accused shall be released immediately.²⁷⁰

²⁶⁵ Rome Statute of The International Criminal Court, 1998 Article81 (1)(b).

²⁶⁶ *Ibid* Art. 81(2)(a).

²⁶⁷ *Ibid.*, Art. 81(2)(b).

²⁶⁸ *Ibid.*, Art. 81(2)(c).

²⁶⁹ *Ibid.*, Art. 81(3)(b).

Pending any appeal by convicted person, the appellate court shall suspend the execution of the decision or sentence during the period allowed for appeal and for the duration of the appeal proceedings.²⁷¹ The judgment of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgment shall state the reasons on which it is based. When there is no unanimity, the judgment of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.²⁷² Art.83 of Rome Statute states, which may also be in the absence of the person convicted.²⁷³

The ICTY lays down that The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers ...on the following grounds:

- (a) an error on a question of law invalidating the decision; or
- (b) an error of fact which has occasioned a miscarriage of justice.²⁷⁴

The *Black's Law Dictionary* defines the term 'revision' that examination of a lower court's decision by a higher court, which can affirm, reverse, modify, or vacate the decision.²⁷⁵

Art 83(2) of the Rome Statute lay down that if the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

²⁷⁰ *Ibid.*, Art. 81(3)(C).

²⁷¹ Rome Statute of International CC, Art. 81(4).

²⁷² *Ibid.*, Art.83(4).

²⁷³ *Ibid.*,Art.83(5).

²⁷⁴ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (International Tribunal for the Former Yugoslavia), 25(1)(a)(b).

²⁷⁵ Bryan A. Garner, *Black's Law dictionary*,(Thomson Reuters: West Publishing, 1999)1434.

(a) Reverse or amend the decision or sentence; or

(b) Order a new trial before a different Trial Chamber.²⁷⁶

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the prosecutor on the person's behalf, may apply to revise the final judgment of conviction or sentence on the grounds that:

(a) New evidence has been discovered that:

(i) was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict.²⁷⁷

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified.²⁷⁸

(c) One or more of the judges who participated in conviction or confirmation of the charges have committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office.²⁷⁹

2. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

²⁷⁶ Rome Statute of ICC, Art. 83 (2)(a, b).

²⁷⁷ *Ibid.*, Art.84(1)(a)(I,II).

²⁷⁸ *Ibid.*, Art.84(1)(b).

²⁷⁹ *Ibid.*, Art.84(1)(c).

(c) Retain jurisdiction over the matter, with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgment should be revised.²⁸⁰

The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.²⁸¹ Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person may submit to the tribunal an application for review of the judgment.²⁸²

2.3.3 Right to Abolish Death Penalty from Juveniles Accused, Pregnant Women and Extreme Old Age

Punishment of death shall not be awarded for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.²⁸³

The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.²⁸⁴

Sentence of death shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.²⁸⁵

²⁸⁰ Rome Statute of ICC, Art.84(2)(a,b,c).

²⁸¹ Statute of the International Tribunal for Rwanda, Article 25(2).

²⁸² Statute of the International Tribunal for the Former Yugoslavia ,Article 26.

²⁸³ ICCPR, Art.6(5).

²⁸⁴ ICCPR, Art.10(3).

²⁸⁵ American Convention on Human Rights, Art.(4)(5).

Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.²⁸⁶ Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social re-adaptation of the prisoners.²⁸⁷

2.3.4 Protection against Double Jeopardy and Heavier Punishment

A Person once acquitted or convicted by a competent court can not be tried for the same offence. It is based on the Latin maxim '*nemo bis punitur pro eodem delicto*' which means no one is punished twice for the same offence.

Double Jeopardy is explained in Black's Law Dictionary that The fact of being prosecuted twice for substantially the same offence.²⁸⁸ The important principle in ensuring Human Rights in the Protection against double jeopardy'---that is, no person can be punished for the same offence twice.²⁸⁹ A second prosecution for the same offense after acquittal or conviction or multiple punishments for same offense the evil sought to be avoided by prohibiting double jeopardy is double trial and double conviction, not necessarily double punishment.²⁹⁰ It is rule of law, stated in another legal maxim that '**Nemo debet bis vexari pro unaet eadem causa**' a man shall not be twice vexed for one and the same cause.

According to the general principles of international criminal law no person shall be prosecuted or punished for the same offence more than once. Often Instruments of

²⁸⁶ American Convention on Human Rights, Art. 4(6).

²⁸⁷ Ibid, Art . 5(6).

²⁸⁸ Bryan A. Garner ,*Black's Law Dictionary*.(Thomson West: West publishers,2009),506.

²⁸⁹ S.C. Joshi, *Human Rights Concept, Issues, and Laws* (New Delhi: Akansha publishing House,2006)49.

²⁹⁰ <http://legal-dictionary.thefreedictionary.com> (Accessed: 06/01/2012).

International Human Rights discourage and prohibit the double jeopardy as well as heavier punishment other than prescribed by law.

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.²⁹¹ No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.²⁹²

2.3.5 Right of Compensation for Wrongly Arrested, Detained, and unlawful Confined and Convicted person or in Case of Failure and Miscarriage of Justice also Right to be released without delay on Acquittal

Miscarriage of Justice means a grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime.²⁹³

When a person has by a final verdict been convicted of a criminal offence and when consequently his conviction has been reversed or he has been pardoned on the basis that a new or newly revealed fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be

²⁹¹ UDHR, Art. 11 (2).

²⁹² ICCPR, Art. 14(7).

²⁹³ Bryan A. Garner, *Black's law, Dictionary* (Thomson west: West Publishers, 1999)1013.

compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.²⁹⁴

Every person has the right to be compensated in the due course of law in the event he has been sentenced by a final judgment through a miscarriage of justice.²⁹⁵ Art.85 (1) of Rome Statute observes the remedies to a person wrongfully arrested or convicted individuals the right to receive fair compensation:

(1) A person who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.²⁹⁶

(2) When an accused has by a final judgment been convicted of a crime, and when subsequently his or her conviction has been reversed on the ground that a new or newly exposed fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated to the law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.²⁹⁷

(3) Where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the rules and regulations of procedure and evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.²⁹⁸

²⁹⁴ ICCPR.Article14 (6)

²⁹⁵ American Convention on Human Rights , Art.10.

²⁹⁶ Rome Statute of the International Criminal Court , 1998 Art. 85(1).

²⁹⁷ *Ibid* Art. 85(2).

²⁹⁸ *Ibid* Article 85(3).

Chapter-III

Rights of Accused in Islamic Criminal Law

The aims and objectives of Islamic Criminal Law are to:

- I) Protect and preserve the objectives of Islam.
- II) Maintain justice between prosecutor and accused.
- III) Decide a case on merit and without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- IV) Provide justice and condemn injustice associate the former with reward and later with punishment.
- V) Eliminate discriminations by way of poor and rich, black and white before the court of justice.
- VI) Avoid the innocent from punishment and bring the real criminal before justice.

Islamic criminal law is a part of *Shariah* law regarding the crimes and punishments based on the *Quran* and the *Sunnah* of the Prophet (SAW) as well as the acts and conducts of the *Sahabah* (companions of the Prophet). This is the reason that Islamic criminal law is a vast and broad field. The study is relevant only to the rights of accused in Islamic criminal law which provides to the accused various rights. These rights are available in the texts of *Quran*, *Sunnah* and *Ijtihad* (juristic deduction).

3.1 Presumption of Innocence

The basic principle in Islamic criminal law and procedure is the presumption of innocence. The Prophet of Islam narrated, ‘*avoid using circumstantial evidence in hudud.*’²⁹⁹ Which are the most serious of all crimes since they are specified in the holy Qur'an or developed by the *Sunnah*. The principle ‘presumption of innocence’ however also applies to *qisas* (retaliatory punishment) crimes and to the lesser *ta'azir* crimes.

The Holy Prophet reported, ‘*the onus of proof is on the petitioner and the oath is for respondent.*’³⁰⁰ It is worth mentioning to collect a legal maxim as ‘*everyone is free of liability unless a liability is proved against him.*’ The burden of proof of evidence rests upon the accused, and doubt is to be resolved in favor of the accused. The Prophet (PBUH) of Allah says, ‘*had men been believed only according to their allegations of charges, some persons would have claimed the blood and properties belonging to others, but the accuser is bound to present positive proof.*’³⁰¹

Hazrat Aisha (R.A), reportedly admonished Muslims to ‘*avoid condemning the Muslim to Hudud whenever you can, and when you can find a way out for the Muslim then release him for it. If the Imam errs it is better that he errs in favor of innocence to pardon him than in favor of guilt to punish him.*’³⁰² Art.7 of Arab Charter on Human Rights declares that the accused shall be presumed innocent until proved guilty at trial in which he has gotten the guarantees necessary for his defense.³⁰³

²⁹⁹ Al-Hadith

³⁰⁰ *Al-Tirmizi –al-Sunan babal- Buyoo* 1606.

³⁰¹ Osman Abd el-Malek Al-Saleh, *The Right of the Individual to Personal Security in Islam*, in The Islamic Criminal Justice System (London: Cherif M. Bassiouni ,1982)67.

³⁰² Cherif M. Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal justice System* (USA: Oceana Publications,1982), 26.

³⁰³ Arab Charter on Human Rights, Art. 7.

3.2 The Right to Fair and Open Trial before an Impartial Qadi

The Islamic criminal law provides to the accused the fair and public trial rights before an independent and impartial *qadi*. The qualifications and character of the *qadi* and the stern and strict requirements of Islamic rules of evidence help to ensure that the accused receives a fair trial.³⁰⁴ The *qadi* must be a male although, the *Hanafi* permit a female to serve as *qadi* under limited circumstances. He must possess recognized intelligence, wisdom, and *adala* (*religious piety*) and be well versed in the *Shari'a*. He must be above reproach in his personal behavior and should not accept favors or gifts or attend private festivals or celebrations.³⁰⁵

The *qadi* is accountable to *Allah*. *Omar*, the Third Caliph, observed that ‘we have set thee as a viceroy in the earth, therefore, judge a right between mankind and follow not desire that it beguile thee away from the way of *Allah*.’³⁰⁶ The *qadi* is to be ‘strong without being harsh, lenient without being weak, of such disposition that a strong and influential person should not expect injustice from him and a weak one should not become hopeless of his Justice. He should be sober, intelligent, and pious and he should not be a tyrant and snubbing.’³⁰⁷

It is a common saying in the Islamic tradition that you can give an unjust law to a just judge, but you cannot give a just law to an unjust judge.³⁰⁸

³⁰⁴ Mathew Lippman, Islamic Criminal Law & Procedure: Religious Fundamental Volume, Modern Law (Boston College International & Comparative Law Review, Vol: 12/ Issue 1, 12-01-1989), 50. (Accessed: 31/01/2012).

³⁰⁵ Ghulam Murtaza Azad, *Conduct and Qualities of a Qadi*, Islamic Studies (Islamabad: IRI, 1985), 56-57.

³⁰⁶ Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal justice System*, in The Islamic Criminal Justice System (C. Bassiouni ed. 1982) 39.

³⁰⁷ Ghulam Murtaza Azad, *Conduct and Qualities of Islam*, Islamic Studies (Islamabad: IRI, 1985), 59.

³⁰⁸ Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal justice System*, in The Islamic Criminal Justice System (C. Bassiouni, 1982), 39.

Noel J. Coulson is an author of various standard books explains that, in addition to the accused's procedural protections and the high standards of personal and judicial conduct to which the *qadi* must adhere, the integrity of the Islamic criminal process is safeguarded by the fact that the rules of evidence are particularly stringent. It is claimed that this ensures that criminal convictions and punishments are imposed only in cases in which there is a certainty of guilt.³⁰⁹ Islamic law thus shares the Anglo-American view that it is preferable to allow several guilty offenders to escape punishment rather than to allow an innocent person to be wrongfully convicted and punished.³¹⁰

*It has been narrated 'Abdur Rahman bin Abi Bakra: Abu Bakra wrote to his son who was in Sijistan: 'Do not judge between two persons when you are angry, for I heard the Prophet saying, A judge should not judge between two persons while he is in an angry mood.'*³¹¹

3.3 No Retroactive Application of the Criminal law

Islamic criminal law provides the protection against retrospective criminal punishment. This is based on the maxim, which provides to the effect that. '*There is no crime and no punishment except when there is a law prescribing so.*'³¹² *Law is not to be applied retroactively.* The holy *Quran* described at *Surah Bani Isra-il*, that '*We visit with Our Wrath until We (God the Glorious) had sent an apostle (to give warning)*'.³¹³ It is clear from the above cited *Ayah* (verse) that the accused must first be given the opportunity to know the law, and without prior law no punishment shall be

³⁰⁹ Noel. J. Coulson, *Conflicts and tensions in Islamic Jurisprudence* (Cambridge: Cambridge University Press, 1969) 64-65.

³¹⁰ *Ibid.*,

³¹¹ Book 89, Number 272: *Bukhari Sharif*, Trans: <http://qurango.com/bukhari/089.sbt.html>

³¹² Ashraf Md. Hashim, *Rights of suspect and accused under Islamic and Malaysian law*, (Petaling Jaya: International law, Book Services, 2004), 299.

³¹³ Abdullah Yusuf Ali, trans., *The Holy Quran*, (Islamabad: Dawah Academy) al-Bani Isra-il, XVII:15.

imposed. This verse is interpreted to require that individuals be informed of the provisions of a law before they are prosecuted or punished for violating the law's requirements. The holy Prophet did not apply the, *Shariah* to individuals who, prior to their acceptance of Islam, violated the *Quranic* prohibitions against being married to two sisters at the same time, being married to their father's former wives etc. Although the arguments of most jurists, that a law which benefits the accused may be applied retroactively.³¹⁴

Similarly, in *Sural al-Qasas* it is declared, "Nor was thy Lord the one to destroy a population until He had sent to its Centre an Apostle, rehearsing to them our Signs, nor are We going to destroy a population except when its members practice iniquity.³¹⁵" In *Surat al-Nissaa* it is worthy to say, 'Apostle who gave good news as well as warning, that mankind, after (the Coming) of the apostles, should have no plea against God: for God is Exalted, Wise'.³¹⁶

And in *Surat al-Maeda*, *Know ye that God is strict in punishment and that God is oft-forgiving (what is past), Most merciful.*³¹⁷ Rarely does one find more clear texts in the *Quran* confirming the same principle so forcefully. Non-retroactivity was also the subject of the holy Prophet. At the occasion of last Address of holy Prophet, He (SAW) said, *There is prescription for blood crimes spilled (committed) in the days of ignorance (before Islam was revealed).*³¹⁸

³¹⁴ Osman Abd el-Malek al -Saleh, *The Right of the Individual to Personal Security in Islam*, in The Islamic Criminal Justice System (London:C. Bassiouni,1982),63.

³¹⁵ Al- Quran, trans, XXVIII: 59.

³¹⁶ Al-Quran trans, iv: 165.

³¹⁷ *Ibid*,V:98

³¹⁸ *The Last Address of the Prophet*

In the days of *Jahilia* (ignorance), before Islam, revenge was general, but since the advent of Islam, it was no longer accepted. But since the *Quran* prescribed penalties, these were not applicable to deeds committed prior to the revelations and their divulgation.³¹⁹

3.4 Right to check the Credibility of Witness and Right of Testimony

The source for proving a crime is *shahadah* (testimony) which is the right of the accused that it must be proved against him otherwise the imposition of punishment is wrong. The technical meaning of the term 'Shadah' is to give true information before a court of justice about the occurrence of a crime for the purpose of proving or disproving which one has seen or is known to him.³²⁰ The accurate method of shahadah in Shariah, regarding witness in hudud and tazir cases appealing to mind. The logical numeral distribution and the difference of male and female witnesses wonder the non Muslim jurist.

The accused has the right to check the credibility of witness to defend himself of the alleged accusation. This may be accomplished by proving that the evidence cited is invalid or by presenting other evidence that contradicts it. In any case, the accused has the right, must be allowed to exercise this right of defense so that the accusation does not turn into a conviction.³²¹ Islamic law stresses on evidence to prove the facts relevant for

³¹⁹ Cherif M. Bassaouni, "Crimes and Criminals Process," *Arab law Quarterly* 12, No.5 (1997), <http://www.jstor.org/page/info/about/policies/terms.html>

Contemporary criminal law in Muslim countries recognizes and applies the "principles of legality" See, e.g., Abdel-Ahad Gamal el-Din, "Fil Shar'ia al-Jina'i" (About Criminal Legality) (Ein-Shams University,

Cairo, Egypt, n.d., circa 1990). For a comparative and historical perspective, see M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 87-146 (Nijhoff Publishers) The Hague, The Netherlands, 1992).

³²⁰ Dr. Anwarullah, *Islamic Law of Evidence*, (Islamabad: Shariah Academy IIU, 1994)4.

³²¹ Tāhā J. al Alwānī and Yusuf Talal De Lorenzo., "The Rights of Accused in Islam," *Arab Law Quarterly*, 10, No 3, 1985) 238, <http://www.jstor.org/page/info/about/policies/terms.html>

the judgment of a court. Because unless it is not proved beyond reasonable doubt that the accused has committed the crime or the respondent has taken the right of the prosecution, he cannot be held liable to the punishment of the crime or the reinstatement of the right.³²²

An accusation means that there is the possibility of doubt, and just how much doubt there is will determine the amount and parameters of defense. By comparing the evidence presented by the defense with that of the party making the accusation, the truth will become clear-which is, after all, the objective of the investigation.³²³

Self defense is not only the right of the accused to ignore as he pleases, but also the right and duty of prosecution. If it is in the best interests of an individual not to be convicted when he is in fact innocent, the interests of society are no less important.³²⁴ It is the society's concern that the innocent are not convicted and that the guilty do not escape punishment. Therefore it is the reason that the Shariah guarantees the defense right, and prohibits its denial under any circumstances and for any reason.³²⁵

3.5 Right to Counsel

The right of an accused to seek assistance of a lawyer is clear from the following verses of the holy Book and *Hadith*. The holy *Quran* says *the alms are only for the poor*

(Accessed:11/01/2012).

³²² Dr. Anwarullah, *Islamic law of Evidence*,(Islamabad: Shariah AcademyIIU,1994),1.

³²³ Tāhā J. al 'Alwānī and Yusuf Talal De Lorenzo.,The Rights of the Accused in islam," *Arab Law Quarterly*, 10,No.3, 1985) 238,<http://www.jstor.org/page/info/about/policies/terms.jsp> (Accessed:11/01/2012).

³²⁴ Tāhā J. al 'Alwānī and Yusuf Talal De Lorenzo.,The Rights of the Accused in islam," *Arab Law Quarterly*, 10,No.3, 1985) 238,<http://www.jstor.org/page/info/about/policies/terms.jsp> (Accessed:11/01/2012).

³²⁵ Tāhā J.al 'Alwānī and Yusuf Talal De Lorenzo, "The Rights of Accused in Islam (Part Two)," *Arab Law Quarterly*, 10,No.3 (1985) ,238, <http://www.jstor.org/page/info/about/policies.jsp> (Accessed:11/01/2012).

*and the needy and those who collect them;*³²⁶ this inference is for attorney ship at fact. The Prophet (SAW) said that, *"I am only human, and some of you are more confident than others. So sometimes a disputant will come to me, and I will consider him truthful and judge in his favor. But if ever I have (mistakenly) ruled that a Muslim's right be given to another, then know that it is as flames from the hellfire. Hold on to it or (if you know it belongs to another) abandon it".*³²⁷ The right of individuals or their attorneys to present evidence finds support in the *Sunnah*. When granting Ali the governorship of Yemen the Prophet of Allah directed *Ali (RA)*, *"If two adversaries come for arbitration, do not rule for the one, before you have similarly heard from the other, for it is best that you should have a clear idea of the best decision."*³²⁸

It was the opinion of *Imam Abu Hanifah* that “one who appoints another to represent him before the court is responsible for whatever ruling is passed, even though the one represented may not be present when the ruling is made.” Other jurists also have the same opinions.³²⁹

Many texts of *Shari'a* stress the need to resolve disputes by whatever means and source necessary. When we consider the great differences in talent and ability particularly the ability to argue and debate effectively that exist between the disputants, even those brought before the Messenger (SAW), it is recognizable that any procedure that will lead to a just settlement may be considered valid and lawful.³³⁰ Therefore, the accused’ s decision to ask for help in defending himself may also be considered valid, provided that

³²⁶ Al Quran,IX:60.

³²⁷ Tahā J. al 'Alwānī and Yusuf Talal De Lorenzo., “The Rights of Accused in Islam,” (part Two) *Arab Law Quarterly* 10, No.3(1985)239, <http://www.jstor.org> (Accessed: 11/01/2012).

³²⁸ Al-Imam Ahmad bin Hanbal ,*Masnad al Imam Ahmad bin Hanbal* ,15:208,*Muhammad Ibne Surah al-Tirmizi, al-Jamia'a al-Sahih*,3:618.

³²⁹ Tahā J. al 'Alwānī and Yusuf Talal De Lorenzo., “The Rights of Accused in Islam,” (part Two) *Arab Law Quarterly* 10, No.3 (1985)239, <http://www.jstor.org> (Accessed: 11/01/2012).

³³⁰ *Ibid.*,

the help comes from an impartial and independent counsel. With the help of such counsel, the accused may acquire a proper understanding of the charges against him, of what the law says, of the weight of the evidence presented, and of what may be used and how it may be used to refute that evidence. Then taking all of this into consideration, we may assume safely that the accused has the right to defense and also to seek the assistance of someone else.³³¹

It is quite closer to the spirit of *Shariah* and the one possible best opinion that the accused is allowed to seek the legal assistance from counsel. It is even more likely that the right to legal counsel is indicated in cases of criminal law, whether in *hudud* cases, where only the rights of *Allah* are violated or in cases where the alleged crime involves the rights of both *Allah* and His subjects.³³²

The modern Islamic court also has procedure to provide prosecutor for the defense of accused. It is clear that the accused need the assistance of an attorney for presenting his case and to argue the same according to the law.³³³ The accused is allowed to seek the help of a counsel in both before trial and during trial stage for the purpose to find the real facts of the case.³³⁴ The services of a counsel may provide the opportunity in the preparation of a successful defense, necessarily acquire a complete understanding of the charges can be disproved. In the stages of trial more information may also be collected which can prove the accused innocent. Hence, the accused should be allowed to obtain the assistance of a legal counsel from the very beginning.³³⁵

³³¹ Tāhā J. al 'Alwānī and Yusuf Talal De Lorenzo., "The Rights of Accused in Islam (PartTwo)," *Arab Law Quarterly* 10, No.3 (1985)239-240, <http://www.jstor.org> (Accessed:11/01/2012).

³³² *Ibid.*,240.

³³³ Tāhā J. al 'Alwānī and Yusuf Talal De Lorenzo., "The Rights of Accused in Islam (PartTwo)," *Arab Law Quarterly* 10, No.3 (1985)239-240, <http://www.jstor.org> (Accessed:11/01/2012).

³³⁴ *Ibid.*, 240.

³³⁵ *Ibid.*, 241.

The Islamic criminal justice system recognizes the right of the accused for availing the assistance of a counsel at pre-trial or trial, and, and even at the stage of post trial. According to *al -Salih* this statement is based upon the theory of *Shariah* "protected interests" the right to self preservation; includes the safeguarding of individual liberty and dignity and the protection of individual well-being.³³⁶ The theory of "protected interests" recognizes the right of an individual to receive assistance of an expert for safeguarding interests. Professor *Osman Abd Malek al-Saleh* writes, "It is obvious that the principle of preservation of self, is enhanced by extension of the right to counsel to those accused of crimes, as it provides the accused with the means to establish innocence and to defend himself.³³⁷ The Caliph *Umar ibn Abd al-Aziz* advised judges: "If an adversary whose eye has been blinded by another comes to you, do not rule until the other person attends. For perhaps the latter had been blinded in both eyes.³³⁸

The accused and his counsel are to be informed of which are being charged and of the inculpatory and exculpatory evidence. The accused has the right to be presented at all proceedings relating to the charges made against him, also to be informed of what occurs at proceedings which he fails to attend, and to be provided the opportunity to present rebuttal evidence to investigators.³³⁹

3.6 Right to Remain Silent and to be heard and the right to defense

The accused has the right of free expression without the fear of reprisal or the use of truth serum, drugs, or hypnotism to obtain information that he would otherwise not

³³⁶ Osman Abd el-Malek Al-Salih, *The Right of the Individual to Personal Security in Islam*, in The Islamic Criminal Justice System (London: C. Bassiouni, 1982)73.

³³⁷ *Ibid.*,

³³⁸ Awad, *The Rights of the Accused Under Islamic Criminal Procedure*, in The Islamic Criminal Justice System (C. Bassiouni, 1982),97.

³³⁹ *Ibid.*,95.

give.³⁴⁰ The accused may choose not to respond to questions. If he does respond and it is later determined that the answers were false, he may not be charged with, or punished for, bearing false witness. If the accused acknowledges liability or confesses to a *hadd* crime, he may retract his statement and thereby nullify the earlier confession.³⁴¹ That is why the Islamic criminal law is universally accepted and God made law for the best interest of humanity at large.

In a well-known tradition, the holy Prophet (*SAW*) is reported to have told all, who he had just appointed as governor of Yemen ‘*O ‘Ali! People will come to you asking for judgments. When the two parties to a dispute come to you, do not decide in favor of either party until you have heard all that both parties have to say. Only in this manner will you come to a proper decision, and only in this way will you come to know the truth.*³⁴²’’ It is related that *‘Umar ibn ‘Abd al ‘Aziz* said to one of his judges: “*When a disputant comes to you with an eye put out, do not be quick to rule in his favor. Who knows, may be the other party to the dispute will come to you with both eyes put out!*”³⁴³

The accused has the right to defense is the basic rules regarding defense otherwise cannot be convicted. This is why some jurists have viewed that a dumb mute cannot be punished for *hadd* crimes, even when all conditions regarding evidence have been satisfied. Because if the mute were capable of speaking, he might be able to raise the sort of doubts that negate the *hadd* punishment for a lesser, *tazir* punishment or amercement, by way of signs only, he may not be able to express all that he may want to. So, under

³⁴⁰ Samira I Janzuri, *research in al Majallaha l ‘Ara Syah*, no. 7 (March 1978):1 19.

³⁴¹ Tāhā J. al ‘Alwānī and Yusuf Talal De Lorenzo, *Arab Law Quarterly*, Vol 10, No.3, 1985) Page: 241, <http://www.jstor.org/stable> Accessed:11/01/2012).

³⁴² Al.Hadith

³⁴³ Tāhā J. al ‘Alwānī and Yusuf Talal De Lorenzo., “The Rights of Accused in Islam (Part Two),”*Arab Law Quarterly*10, No. 3(1985),238-239 ,<http://www.jstor.org/page/info/about/policies/jsp> (Accessed:11/01/2012).

such circumstances, if the *hadd* punishment imposed justice will not have been served, because *hadd* will have been imposed in the presence of doubt.³⁴⁴

In the pre-trial interrogation under the common law, the accused has the right to refuse to answer questions and the accused's silence may not be used as evidence of guilt.³⁴⁵ The accused is to be treated kindly and is to be encouraged to deny his guilt.³⁴⁶ When a person confessed to adultery, the Prophet urged retraction of the confession, '*Maybe you only kissed her? Maybe you only touched her?*' The Prophet also coaxed a woman accused of theft to withdraw her confession: "*Did you steal? I do not think you did. Say, no.*"³⁴⁷

3.7 Freedom from Compulsory self-incrimination, Torture, Abuse of Power, Confess Guilt and Testify Crime

The accused shall be free from compulsory self incrimination be pressured to confession guilt, testify crime. The holy Prophet of God the Glorious said in His last sermon, *O people verily your blood your property and you are sacred, inviolable until you appear before your Lord; just as this day of yours, this month, and this very town are sacred.*³⁴⁸ It has been stated in the holy Book of *Allah*, '*except under compulsion, his heart remaining firm in Faith.*'³⁴⁹ 'Here, *Allah* has said that compulsion is grounds for cancelling the sin of disbelief and the prescribed punishment for apostasy. Therefore, it

³⁴⁴ Tāhā J. al 'Alwānī and Yusuf Talal De Lorenzo., "The Rights of Accused in Islam (Part Two)," Arab Law Quarterly 10, No. 3(1985),238-239 ,<http://www.jstor.org/page/info/about/policies/jsp> (Accessed:11/01/2012),239.

³⁴⁵ Awad, *The Rights of the Accused Under Islamic Criminal Procedure*, in The Islamic Criminal Justice System (C. Bassiouni ,1982),106.

³⁴⁶ Osman Abd el-Malek Al-Salih, *The Right of the Individual to Personal Security in Islam*, in The Islamic Criminal Justice System (London: C. Bassiouni ,1982),73.

³⁴⁷ Osman Abd el-Malek Al-Salih, *The Right of the Individual to Personal Security in Islam*, in The Islamic Criminal Justice System (London: C. Bassiouni ,1982),73.

³⁴⁸ *Al-Buhari*, al-Jame as Sahih,

³⁴⁹ Abdullah Yousuf Ali,TransXVI:106.

may be considered grounds for cancelling other matters. A *hadith* says that the Prophet of Islam said, *the responsibility for mistakes forgetfulness and duress has been lifted from my ummah*.³⁵⁰ 'Umar (R.A) said, that 'a man is not responsible for himself if he is starved, fettered or beaten.'³⁵¹

Ibn Hazm writes in his book that it is unlawful to subject someone to tribulation, either by blows, imprisonment or threats. There is nothing to legitimize such treatment in the *Quran*, or the traditions, or *Ijma* (consensus of juristic opinion), and nothing may be said to be of the religion unless it comes from one of these three sources. So when *Allah* made both the body and the reputation sacred, He (SWT) prohibited the physical and verbal abuse of Muslims, except when required by law as prescribed in the Text and the *Sunnah* of the Prophet.³⁵²

If the confession of guilt or liability is obtained through compulsion, the probability of its being false will be considered greater than its veracity owing to the factor of force. As it was given in the expectations of avoiding a greater or more certain or immediate evil, it cannot be considered as having been given freely, and therefore the majority of *fuqaha'* have ruled that any admission of guilt or liability obtained under duress is invalid and legally inadmissible.³⁵³

It should be clear from the foregoing that the scholars never considered the authorities' use of force against the accused to be justified by the *Shari'a*.³⁵⁴

³⁵⁰ There are several versions of this hadith, some of which are authentic. For details on the occurrence and authenticity of the hadith, see my edition of al Razi's al Mahsul, vol. 1 (Beirut: al Risalah, 1992), 233.

³⁵¹ Abd al Razzaq, Al Musannaf, vol. 10, p. 193.

³⁵² Ibn-Ahmad Hazm, al Muhalla, vol. 11, p. 141; Al- Mu'allâ: abâ 1, Author: Alî Ibn-Amad Ibn-âzムPublisherIdârat al-âibâ'a al-Munîya, 1996 Length 838 pages

³⁵³ Tâhâ J. al 'Alwâni and Yusuf Talal De Lorenzo, Arab Law Quarterly, 10, No. 3, 1985), 241. <http://www.jstor.org/stable> (Accessed: 11/01/2012).

³⁵⁴ *Ibid.*

Some later minority of *Hanafi jurists* would also permit and validate the confession extracted by force from "evil" or "immoral" offenders (provided there is no wounding of the flesh and exposure of bones) on the grounds that it is necessary to halt the spread of corruption.³⁵⁵ Others, while excluding confessions obtained by force from evidence, would permit the use of evidence uncovered as a result of the confession. The accused would retain the right to seek retaliation against the investigative officials responsible for forcibly extracting the confession.³⁵⁶

Some of the later scholars from among our *shaukh*, gave Juristic verdict (*fatwa*) upholding the validity of confessions obtained under duress in cases of theft, for the reason that thieves, in our times, do not willingly admit their crimes.³⁵⁷

Moreover, none of these reasons refutes or even weakens the evidence gathered by the majority of jurists that it is illegal to obtain a confession through the use or threat of force. Their opinions would be valid only if there were contributing circumstances that indicated clearly that the accused was guilty, that he had hidden the stolen item(s), and if the evidence stipulated, for prosecution as a hadd case, was not available. In such a case, a judge could use force to recover what had been stolen.

But even then, there is no evidence to support their opinion. In fact, the Hanafi scholars agreed with the majority that a confession made under duress was always invalid, except in a case of theft. Even in cases of theft, they held that duress might be resorted to only in order to recover stolen goods. Otherwise, the hadd penalty of severing

³⁵⁵ Awad, *The Rights of the Accused Under Islamic Criminal Procedure*, in The Islamic Criminal Justice System (C. Bassiouni ,1982),106.

³⁵⁶ *Ibid.*,106-7.

³⁵⁷ Tāhā J. al 'Alwānī and Yusuf Talal De Lorenzo, *Arab Law Quarterly*, 10, No.3, 1985),241 <http://www.jstor.org/stable> (Accessed: 11/01/2012).

one's hand may not be carried out even when there is suspicion that force had been used.³⁵⁸

Ibn Hazm wrote: In a case, if there is no more (evidence) than a confession obtained under duress, then this will amount to nothing, for such a confession is condoned by nothing in the *Qu'rān*, the *Sunnah*, or *ijmā'*. Moreover, the sacredness of a person's flesh and blood is an established certainty. Thus, nothing of that may be made lawful save by virtue of a text or *ijmā'*. If however, in addition to the confession there is evidence that proves what the accused had confessed to, and that he had undoubtedly been the perpetrator, it then becomes obligatory to carry out the hadd penalty against him.³⁵⁹

Undoubtedly, the opinion of the majority must be considered preponderant in terms of prohibiting duress and nullifying the legal effect of whatever is obtained under duress. This opinion is consistent with the teachings of the *Qu'rān* and the *Sunnah* in relation to the need to uphold truth and justice. A confession obtained under duress cannot be considered truth, and punishment awarded because of it cannot be considered justice. Moreover, the only true deterrent to the dangers that threaten society is the guarantee that truth and justice will prevail. It is for this reason that duress must be considered a source of innumerable evils.

Every person has the right to protection against harassment by official agencies. He is not liable to account for himself except for making a defense to the charges made

³⁵⁸ Tāhā J. al 'Alwānī and Yusuf Talal De Lorenzo, *Arab Law Quarterly*, 10, No.4, 1985),651.
<http://www.jstor.org/stable> (Accessed: 11/01/2012).

(The general rule in regard to hadd penalties is that they may not be administered if there is at least doubt about the case, trans.

³⁵⁹ *Bin Hazm,al Muhalla*, Vol.11,p.142.

against him or where he is found in a situation where in a question regarding suspicion of his involvement in a crime could be *reasonably* raised³⁶⁰

No person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime, or forced to consent to an act which is injurious to his interests.³⁶¹

3.8 Right to Free Confession of Guilt and Right to Retract

Confession is another right of accused in Islamic law in criminal matters and as well as a source of proof of a crime. Confession means a statement made by a person charged with the commission of a crime wherein he acknowledges himself to be guilty of the offence charged.³⁶²

The Holy Quran addresses: ‘*Oh ye who believe stand out firmly for justice, as witnesses to God, even as against yourselves, or your parents, or your kin, and whether it is (against) rich or poor.*’³⁶³

It has been related on the authority of *Jabir Bin Abd Allah* who said that a man from the tribe of *Banu Aslam* came to the holy Prophet (PBUH) and confessed to have committed *zina* and gave testimony against him four times. The holy Prophet then ordered to stone him death.³⁶⁴ *Narrated Abu Huraira: A man came to Allah's Apostle while he was in the mosque, and called him, saying, 'O Allah's Apostle! I have committed illegal sexual intercourse. The Prophet turned his face to the other side, but when the*

³⁶⁰ Universal Islamic Declaration of Human Rights by the Islamic Council of Europe on 19 September 1981, Article 6.

³⁶¹ Universal Islamic Declaration of Human Rights by the Islamic Council of Europe on 19 September 1981, Article 7.

³⁶² Dr. Anwarullah, *Islamic Law of Evidence* (Islamabad: Shariah Academy IIU, 1994), 43.

³⁶³ Abdullah Yousuf Ali, Trans, VI:135.

³⁶⁴ Muhammad Bin Ismail ,*al Bukhari*, Trans 2:176.

man gave four witnesses against himself, the Prophet said to him, "Are you mad?" The man said, "No." So the Prophet said (to his companions), 'Take him away and stone him to death'.³⁶⁵ Requirements for the validity and authenticity of confession minor, mad, insane, idiot, Intoxicated and sleeping person, fits of fainting are exempted from confession.³⁶⁶ Among the most important conditions to be satisfied before a confession may be accepted is freedom of choice. A confession made of one's own wish will be considered valid as its authenticity is more probable than its misrepresentation and deception. This assumption is based on the fact that it is incredible and inconceivable that a rational person would admit to something harmful unless there was a good reason to do so.³⁶⁷

The use of deceit to obtain an admission of guilt from the accused was preferred by Ibn Hazm, who cited a narration³⁶⁸ He likewise mentioned that the companions used deceit to obtain admissions of guilt. As there is no coercion or torture involved, Ibn Hazm considered it a good method. Earlier, Imam Malik had viewed that deceit was reprehend

³⁶⁵ Trans, Sahih Bukhari, Vol 9, Book 89, No. 280, <http://qurango.com/bukhari/089.sbt.html>

³⁶⁶ Dr. Anwarullah, Islamic Law of Evidence (Islamabd: Shariah Académie IIU, 1994), 44.

- (1) The person who confesses must be adult, sane. It is based on the tradition of the holy Prophet who said, *'Three persons have been exempted (i) the minor until he attains puberty, (ii) the mad until he recovers and (iii) the sleeping person until he awakes.'*
- (2) The confession must be explicit and as to the commission of the crime and violation of the right, It is based on the Sunnah of the prophet (SAW) Narrated Nu'aym (RA), Ma'iz Bin Malik al-Aslami came to the Prophet (SAW) and admitted (having committed adultery) four times in his presence so he ordered him to be stoned to death, but said to Huzzal, if you had covered him with your garment, it would have been better for you. In this tradition He (SAW) asked several questions about the commission of zina from Maiz Bin Malik al-Aslami who confessed to have committed zina and when he clear cut answered all the questions, and then Prophet ordered to stone him to death.
- (3) The person who confesses must be capable of self expression.
- (4) It must be with free consent, and without any pressure and compulsion. These statements is based on the narration of the holy Prophet who said, *My Ummah has been exempted from the (liability) of the action done by mistake, forgetfulness or for which they have been forced to do.*

³⁶⁷ Taha J. al 'Alwānī and Yusuf Talal De Lorenzo, *Arab Law Quarterly*, 10, No.3, 1985), 241. <http://www.jstor.org/stable> (Accessed: 11/01/2012).

³⁶⁸ This hadith was related by Anas bn Malik and was included in the collections of Bukhari, Muslim, Abu Dawud, Ibn Majah, Imarn Ahmad, and others, trans.

The Holy Quran explicitly prohibits the use of beatings, torture, or inhuman treatment to extract a confession. This type of treatment violates the dignity of the accused, results in a loss of confidence in the Islamic system of justice, and creates a risk of false confessions. The use of torture is a sin.³⁶⁹ The Prophet warned that God shall torture on the Day of Recompense those who inflict torture on people in life,³⁷⁰ and one scholar admonished that it is better that they should face God with their offenses than I should have to meet God for torturing them.³⁷¹

The majority of jurists would exclude from evidence confessions obtained by force or deceit. This is based on the belief that a source determines the offshoot³⁷² and a "right cannot arise out of wrong."³⁷³

Confessions are the third major form of evidence in *Shari'a* courts. A confession must be given in open court as many times as the number of witnesses required to prove the defendant's guilt. Each confession must be given at a separate hearing.³⁷⁴ Pressure, deception, coercion, abuse, or encouragement by the *qadi* nullifies a confession.³⁷⁵ The person confessing must be sane (capable of understanding the admission and comprehending the confession's legal consequences) and of mature age.³⁷⁶ and may be withdrawn at any time prior to the execution of the sentence. Such withdrawal will

³⁶⁹ Osman Abd el-Malek Al-Salih, *The Right of the Individual to Personal Security in Islam*, in the Islamic Criminal Justice System (London: Cherif. Bassiouni ,1982),72.

³⁷⁰ *Ibid.*,

³⁷¹ Al-Salih, *The Right of the Individual to Personal Security in Islam*, in The Islamic Criminal Justice System (C. Bassiouni ,1982) ,72.

³⁷² Awad, *The Rights of the Accused Under Islamic Criminal Procedure*, in The Islamic Criminal Justice System (C. Bassiouni ,1982),107.

³⁷³ *Ibid.*,

³⁷⁴ Salama, *General Principles of Criminal Evidence in Islamic jurisprudence*, in The Islamic Criminal Justice System (c. Bassiouni ,1982),119.

³⁷⁵ Salama, *General Principles of Criminal Evidence in Islamic jurisprudence*, in The Islamic Criminal Justice System (c. Bassiouni ,1982),119.

³⁷⁶ *Ibid.*,

nullify the Judgment of guilt.³⁷⁷ In modern practice the *qadi* may attempt to circumvent these rigid rules. In cases in which the evidence fails to establish the *Hudud* offense (e.g., theft), the *qadi* may find the defendant guilty of a lesser *Ta'azir* offense (e.g., larceny by trick or deceit). The *qadi* is also known to exercise discretion during the punishment stage. In cases involving sexual offenses, the *qadi* may dismiss the charges on the condition that the male marry the female victim.³⁷⁸

There are two situations, one in which the accused has the rights for which the retraction of an admission is valid. These are the *hudud*, which are the rights of God and may be waived whenever doubts arise in relation to them. Thus if a person accused of a *hadd* crime retracts, there is the chance that the original admission was false and that the retraction is true. As *hadd* penalties must be waived whenever doubts arise, one who has confessed adultery, for example, can have this punishment waived if he retracts his confession.³⁷⁹ Imam Malik, however, is reported to have said that a retraction is acceptable only if it leads to doubt. Actually, there are two versions of Malik's opinion on when a retraction does not lead to doubt. The best known version is that it will be accepted, while the lesser known is that it will not.³⁸⁰

This difference of legal opinion occurred in regard to the *hadd* penalties for theft and intoxication. The jurists agreed generally at a retraction may not be accepted in the case of *qadhf* (false accusation). They also differed on *hirrabah* (highway robbery). One opinion held that any retraction in such a crime may not be accepted, because the rights

³⁷⁷ *Ibid.*,120.

³⁷⁸ Rosen, *Equity and Discretion in a Modern Islamic Legal System*, 15 L. & Soc'y (1980-1981)234-235.

³⁷⁹ See al Ifsah,vol.2,p.406;Kash vol. 6, p. 99;al qawanin al Fiqhiyah,p.344;Bidayat al Mujtahid, vol.2,p.477;;Mughni al Mabsut vol. 150,p.477;Mugheth al Muhtaj , vol. 4, p. 150; Badai al Sanai,vol.7, vol. 7, p. 61; al Mabsui, vol 9, p. 94.

³⁸⁰ See Ibn Rushd, op cit., vol. 2, p. 477.

involved were those of people in need of protection, as in the case of false accusation (where the rights of the innocent are to be protected). The second opinion is that retraction should be accepted just as a retraction in the case of adultery may be accepted.³⁸¹

The evidence for accepting a retraction of a confession to a hadd crime comes from the *hadith* in which *Ma'iz* is prompted by the Prophet to retract his confession to adultery, '*May be you simply kissed, or felt, or looked ...*' Had retraction not been an option, the Prophet would not have prompted him in the manner reported. Retraction of a confession to a *hadd* penalty may be made by declaration, as in stating: 'I retract my confession,' or by indication, as when one flees from the place where the penalty is to be applied. Likewise, a retraction may be made before or after the *qadi* rules.

3.9 Right to Compensation for Mistakes in Adjudication

A criminal case is opened by the prosecutor presenting his allegations against the accused before *qadi*. If the accused denies guilt, the petitioner or state presents the prosecution witnesses. Four witnesses are required to establish adultery while two witnesses are required to establish other offenses.³⁸² An individual who lodges a charge of adultery but fails to present four eyewitnesses is subject to the *Hudud* offense of defamation (*Qazhf*), punishable by eighty lashes. The witnesses must testify to having viewed the act of carnal conjunction and agree on the time, place, and identity of the parties.³⁸³ A husband is privileged to bring a charge of adultery against his wife who is not supported by the four witnesses. If she denies her guilt, a divorce is ordered.³⁸⁴

³⁸¹ See al Nawwawl, al Al Muhadhab, vol. 2, p. 364.

³⁸² N. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (1969), 63-65.

³⁸³ M. Siddiqi, *The Penal Law of Islam*, (1979), 69.

³⁸⁴ R. Roberts, *the Social Laws of the Quran*, (1971), 34-35.

Witnesses must be male Muslims, although certain jurists, in isolated instances, involving property or employment, permit the testimony of two female witnesses to be substituted for that of a single male witness.³⁸⁵ Women are viewed as having weakness of understanding ... want of memory and incapacity of governing.³⁸⁶

Witnesses must be sane (both when observing an alleged criminal offense and when testifying); of legal age (having reached puberty; free; neither dumb, mute, nor blind; and must not have been punished for a serious crime or have engaged in sinful behavior. They must be of good character and *adl* (integrity) and their righteousness and sense of honor must be beyond reproach.³⁸⁷ Witnesses may not testify in cases involving immediate family members or in cases in which they have an interest.³⁸⁸ A witness has a duty to testify truthfully. Bearing false witness is a *Ta'azir* offense punishable by *tashir* (public labeling), which entails parading the offender through the city and proclaiming that he is not to be trusted.³⁸⁹ There appears to be no duty upon a Muslim to testify in cases in which a conviction may result in corporal punishment. The Prophet of Allah stated it was commendable to assist in the prevention of corporal punishment.³⁹⁰ A witness' testimony must begin with the phrase *ashhadu* (I bear witness) indicating that he is testifying as to matters he has personally seen and that he is certain of the truthfulness of his testimony. No other phrase e.g., (I know or I am certain) is acceptable. All witnesses must concur in

³⁸⁵ M. Siddiqi, *The penal of Islam* (1979), 45.

³⁸⁶ M. Siddiqi, *The Penal of Islam* (1979), 45.

³⁸⁷ Salama, *General Principles of Criminal Evidence in Islamic jurisprudence*, in The Islamic Criminal Justice System, (c. Bassiouni, 1982), 109, 117.

³⁸⁸ *Ibid.*, 118.

³⁸⁹ Muhammad Iqbal Siddiqi, *The Penal Of Islam* (Lahore: Kazi Publishers 1979), 180.

³⁹⁰ *Ibid.*, 44.

the description of time, place, and circumstances of an offense in order to support a conviction.³⁹¹

Hearsay evidence is inadmissible; an individual may not testify concerning an event which another individual allegedly observed. Documents have no independent evidentiary value.³⁹² The rules require that a defendant's guilt be established by direct rather than by circumstantial evidence. A homicide, for instance, may not be established by witnesses testifying that they overheard a violent struggle, saw the accused emerge from his house with a blood-stained knife, and then discovered the victim's body.³⁹³ Jurists differ as to whether a *qadi* may rely (circumstantially) upon presumptions to establish a defendant's guilt. The *Maliki* School permits fornication to be legally established by the birth of a child to a female who has never been married and who has not lodged an allegation of rape.³⁹⁴

Possession of stolen property and the odor of alcohol on the breath are recognized by some scholars as presumptions which establish the crimes of theft and the drinking of alcohol.³⁹⁵ In those cases in which the complainant is unable to produce the required witnesses or the witnesses disagree as to the details of the offense, the *qadi* customarily requests that the defendant take a holy oath denying the plaintiff's allegations. There is no established form for the oath; however, it usually is sworn before two notaries in a mosque. If the defendant takes the oath, the case is dismissed. If the defendant declines to

³⁹¹ *Ibid.*,45,46.

³⁹² Muhammad Iqbal Siddiqi, *The Penal Of Islam* (Lahore: Kazi Publishers 1979),46.

³⁹³ Noel. J. Coulson, *Conflicts And Tensions in Islamic Jurisprudence* (Cambridge: Cambridge University Press,1969),62.

³⁹⁴ *Ibid.*,

³⁹⁵ Salama, *General Principles of Criminal Evidence in Islamic jurisprudence*, in The Islamic Criminal Justice System,(c. Bassiouni ,1982),121.

take the oath following three requests, judgment is entered for the plaintiff.³⁹⁶ Some jurists will enter a judgment for the plaintiff only if the plaintiff takes a holy oath following the defendant's failure to do so.³⁹⁷ Holy oaths are used as an investigative device where a murder has occurred and the killer is unknown (*Quesama*). The inhabitants of the neighborhood or the owner and inhabitants of the house where the body is found are required to swear fifty oaths (either fifty people or fifty oaths) that they did not commit the murder and that they do not know the identity of the killer. They are imprisoned until they swear to the oath. Once having sworn, they pay compensation to the victim's heirs.³⁹⁸

Certain scholars hold the opinion that the *Shariah* gives compensation to the accused that who is placed under detention as a precaution but whose innocence is later established. As proof, they cite the ruling of 'All for compensation (*ghurrah*) to be paid to the mother when miscarriage resulted from an official's mishandling of her case.

It was reported to *Omar ibn al Khattab* that a woman whose husband was away had been entertaining male visitors. Finding this reprehensible, *'Umar* sent someone to question her. When she was told that *Umar* had summoned her to explain her behavior she, became overcome with fear and began to have pains. Unable to continue, she stopped at a house and immediately gave birth to a baby prematurely who, after delivery, screamed twice and died. *Umar (RA)* paid blood price for that.³⁹⁹

³⁹⁶ Noel. J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Cambridge: Cambridge University Press 1969), 63.

³⁹⁷ *Ibid.*,

³⁹⁸ J. Schacht, *An introduction to Islamic Laws* (, 1964), 184.

³⁹⁹ This incident was narrated in the following works: 'Abd al Razzaq, al Musnnsf, vol. 9, p. 454, vol. 10, p. 18, vol. 11, p. 18; Ibn Qudamah, al Mughni, vol. 9, p. 579; Ibn Hizm, al Muhalla, vol. 11, p. 24; al NawawI, al MuhadAdhab, vol. 2, p. 192.

The position taken by the *Hanbali* School is that the responsibility for paying the blood money is the ruler's. If the mother dies for the same reason, her blood money will also have to be paid by the ruler.⁴⁰⁰ On this point the *Shafi'* jurists agreed with the *Hanbali* s, arguing that the child died through no sin of its own and pointing out that the ruler is responsible for blood money in case a pregnant woman miscarries as a result of a *hadd* punishment.⁴⁰¹

3.10 Rights to Protection of Life, Privacy, Honor and Reputation

Islam recognizes the privacy and sanctity of person, effects, correspondence, and names. The Quran admonishes believers: '*Do not enter houses other than your houses until you first ask leave and salute the people there of ...*'⁴⁰² The holy Prophet of Allah has reported '*if a person looks at you without your permission and you dash him with it stone and put out his eye, not guilt will be on you.*'⁴⁰³ The individual and his home, possessions, and correspondence may only be searched by investigative officials if required by the public interest in the maintenance of Social order and safety. The search must be authorized by a warrant issued by the concerned authority based upon probable cause that the accused committed a criminal offense.⁴⁰⁴ A finding of probable cause must be based either upon the testimony of a trustworthy witness or upon evidence that, for instance, "the smell of alcohol and noise of intoxicated persons emanates from inside a house."⁴⁰⁵ Evidence discovered pursuant to a search not authorized by it warrant generally

⁴⁰⁰ Ibn Qildannlu) *al Mwhnl*, vol. 9, p. 579.

⁴⁰¹ Of course, a pregnant women is not to be given a hadd punishment until after she has given birth and weaned her child. However, if a mistake is made and she is punished, then the imam is responsible for whatever results, trans. 28 The opinion of the Zahir jurists

⁴⁰² Abdullah Yousuf Ali, trans, Quran, XXIV; 27, 28.

⁴⁰³ Al-Saleh, The *Right of the Individual to Personal Security in Islam*, in The Islamic Criminal Justice System (C. Bassiouni ,1982),68.

⁴⁰⁴ *Ibid.*,69.

⁴⁰⁵ Osman Abd el-Malek Al-Saleh, The *Right of the Individual to Personal Security in Islam*, in The

is inadmissible at trial.⁴⁰⁶ The Islamic criminal justice system thus places limitations upon the pre-trial.

Investigative process Individuals are free from pre-trial detention, receive cautionary warnings, are safeguarded from coercion and abuse during the interrogation process, and have a right to legal representation. Searches require warrants based upon probable cause. These due process or natural justice protections appear to be based on the dignity of the individual and the desire to achieve just results. The prosecuting authorities or complainant thus must establish a case by obtaining evidence through independent investigation.⁴⁰⁷ In his "Final Pilgrimage", *Hadith*, the Prophet also said: '*Your lives, your property, and your honor are a burden upon you until you meet your Lord on the Day of Resurrection*'. This *Hadith* is interpreted to mean that there is a legal duty to protect life, property and honor) and that whenever any of these protections is abridged, it must be only according to the *Shariah*. This means that substantive, procedural, and evidentiary rules of criminal law must comply with the *Shari'ah*.⁴⁰⁸ It is also a well-established principle in *qisas* crimes, that such circumstantial evidence which is favorable to the accused is to be relied upon by the judge) while if unfavorable to him, it is to be disregarded.⁴⁰⁹

Human life is sacred and inviolable and every effort shall be made to protect it. In particular no one shall be exposed to injury or death, except under the authority of the

⁴⁰⁶ Islamic Criminal Justice System (London: C. Bassiouni ,1982),69.
⁴⁰⁶ *Ibid.*, 70.

⁴⁰⁷ Mathew Lippman, *Islamic Criminal Law &Procedure*: Religious Fundamental Volume, Modern Law (Boston College International &Comparative Law Review, Vol: 12/Issu1, 12-01-1989)50(Accessed: 31/01/2012).

⁴⁰⁸ M. Cherif Bassaouni., *Crimes and Criminals Process*," Arab law Quarterly12,No.5(1997), <http://www.jstor.org/page/info/about/policies/terms.jsp>.(accessed:12/01/2012).

⁴⁰⁹ *Ibid.*,

Law.⁴¹⁰ Just as in life, so also after death, the sanctity of a person's body shall be inviolable. It is the obligation of believers to see that a deceased person's body is handled with due solemnity.⁴¹¹

Man is born free. No inroads shall be made on his right to liberty except under the authority and in due process of the Law.⁴¹²

Allah (SWT) says in the holy Quran: Indeed We have given honor to the son of Adam (the Holy Quran, Al.asra:70)

Respect for the individual is the central precept of Islam. The individual is regarded as the most sacred of *Allah's* creations and therefore must be treated with justice and charity. The warning against persecution of individuals reportedly is repeated 299 times in the *Quran*;⁴¹³ the phrase justice and equality (*al uest*) appears at least sixteen times.⁴¹⁴

Art.8 of Universal Islamic Declaration of Human Rights provides that every person has the right to protect his honor and reputation against calumnies, groundless charges or deliberate attempts at defamation and blackmail.⁴¹⁵

⁴¹⁰ Islamic Universal Declaration, Art.1(a).

⁴¹¹ *Ibid.*,

⁴¹² Universal Islamic Declaration Of Human Rights by the Islamic Council of Europe on 19 September 1981 /21 Dhul Qaidah 1401,Art. 2(a).

⁴¹³ Matthew Lippman, *Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law*, 12 B.C. Int'l & Comp. L. Rev. 29 (1989), <http://lawdigitalcommons.bc.edu/iclr/vol12/iss1/3> Collected From: Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic*

Criminal justice System, in The Islamic Criminal justice System 4, 19 (C. Bassiouni ed. 1982)47.

⁴¹⁴ Osman Abd el-Malek al-Saleh, *The Right of the Individual to Personal Security in Islam*, in The Islamic Criminal Justice System 55, 80 (London: C. Bassiouni ed. 1982)55,80 .

⁴¹⁵ Universal Islamic Declaration of Human Rights by the Islamic Council of Europe on 19 September 1981,Art. 8.

3.11 Confrontation and cross-examination of accused and witnesses

Of all the branches of the Muhammadan law, the law of evidence has placed a permanent disqualifications on the non –Muslims. While testimony of *zimmis* (alien) with respect to each other is admissible, the *Hanafi* lawyers⁴¹⁶ hold that there evidence concerning a Muslim is inadmissible.⁴¹⁷ *Umar (R.A)* in his letter has formulated a principle that determines the party upon whom the onus of proof lies in this regard, he says in his letter: *The burden of proof is on that who alleges and the oath on that who denies.*⁴¹⁸

3.12 Protection against Unlawful and Arbitrary Arrest and Detention

Jurists agree that based on *Shari'ah* principles the accused is to be free from pre-trial detention, is not to be compelled to confess, is to be given the opportunity to be represented by an attorney, and is to be free from warrantless searches and seizures. The system of pre-trial detention and release on monetary bail is generally not recognized in the *Shari'ah*. Islamic jurists appear to agree that the accused should not be detained prior to trial since an accusation of guilt alone is not sufficient to justify an accused's incarceration. Pre-trial detention also interferes with an individual's freedom of movement which is protected by the *Quran*, *It is He who made the earth submissive to you; therefore walk in its tracts, and eat of His provision....*⁴¹⁹

⁴¹⁶ Al-Haj Describes in his Book that The Shafi Jurists hold that Zimmis of the same religion may depose for the against their co-religionists but not in case of Zimmis professing other religion.

⁴¹⁷ Al-Haj Mahomed Ullah Bin S. Jung, *A dissertation on The Administration of Justice of Muslim Law, Preceded by An Introduction to the Muslim Concept of the State*(Lahore: Huzaifah publications Afandi Manzal Aram Bagh.1980),135.

⁴¹⁸ Al-Haj Mahomed Ullah Bin S. Jung, *A dissertation on The Administration of Justice of Muslim Law, Preceded by An Introduction to the Muslim Concept of the State*(Lahore: Huzaifah publications Afandi Manzal Aram Bagh.1980),135.

⁴¹⁹ Quran, LXVII: 15.

3.13 Judicial Determination and Right of appeal, Revision (*Murafiah*)

Under common law tradition, a jury or judge is exposed to a mass of evidence and must assess its weight and credibility to determine if the defendant's guilt is beyond a reasonable doubt. Islamic law, by contrast, only permits the introduction of evidence which is considered to possess a high degree of direct reliability.⁴²⁰

The *Fiqh* literature lays down principles under which a judgment of *qadi* is appealed to other *qadi* or superior courts. ----a cassation principle or a setting aside of judgments for errors of law (and fact) in opinion of the court below and referring the case for final determination to an appellate court other than that which rendered the judgment.⁴²¹ A *qadi* may revise any error that he notices in his judgment at any stage before the execution of the judgment and where he realizes an error in a previously decided case that should not stop him from admitting and not repeating the same error in the subsequent case.⁴²²

Umer (radi Allah anhu) states in his letter to *Abu Musa al-Ashari* about rectification of an incorrect judgment as is under, *if you have given a judgment yesterday, and upon reconsideration reached to the correct opinion you should not hesitate to rectify your yesterday's judgment for justice is primeval, and it is better to retract than to persist in worthless.*⁴²³ These basic principles and the accused's rights are today found in international and regional human rights conventions, and in many national constitutions.

⁴²⁰ Matthew Lippman *Islamic Criminal & Procedure*: Religious Fundamental V Modern law Volume,(Boston College International & Comparative Law Review ,Volume12, No 1; 12-01-1989) 52.

⁴²¹ Anwar A. Qadri, *Islamic Jurisprudence in the Modern World*(Lahore: Printing Press SH. Muhammad Ashraf,1981)497-498. There are certain jurists from whose opinions it is clear that, usually, the *qadi* of The higher court can revise the decision of the lower court *qadi* on a point of law (Darr-ul-Mukhtar,III,231ff;Shara viqayah,III,694.

⁴²² Shaukat Hayat, *An Islamic Code of Judicial Conduct* (Islamabad: Royal Center Margalla Communications, 2000)184.

⁴²³ Ala bin al-Dar Qutni, *Sunan al-Dar Qutni*. 206,Ahmad al-Bayhqi, al-Sunan al-kubra , 4:150,Muhammad

There follow some specific provisions of the *Qu'ran* and accounts of the *Sunnah* which reveal the applicability of these principles and rights. The *qadi* has a duty to render a just judgment consistent with Quranic principles.

Although there is no appeal from the *qadi*'s decision, a defendant may appeal to the ruler following the execution of the sentence. If it is determined the defendant was wrongfully punished, the *qadi* will be removed from office and the same punishment which was wrongfully imposed on the defendant will be inflicted upon the *qadi*; also, the defendant will be compensated.⁴²⁴ If the appellant is found to have lodged a false appeal, he is subject to a *Ta'azir* punishment for lying.⁴²⁵ Joseph Schacht a prominent Scholar author of famous books explains that, a successor to a *qadi* also has the prerogative to release individuals. He concludes have been improperly convicted and imprisoned by his predecessor.⁴²⁶

3.14 Right to Justice and Equality also Judicial and Governmental Decisions must conform to the Shariah

To maintain an absolute equality between the accused and prosecution to a dispute is one of the significant duties of a *qadi*.

Oh ye who believe! Stand out firmly for justice, as witnesses to God even as against yourselves or your parents, or your kin, and whether it be (against) rich or poor, for God can best protect both; follow not the lusts of your hearts lest ye swerve, and if ye

al Sinani, Subul al-Salam,4:119.(Umer Letter to Abu Musa al-Ashari) ,Trans by Shaukat Hayat *An Islamic Code of Judicial Conduct* (Islamabad: Royal Center, Margalla Communications,2000),174.

⁴²⁴ Osman Abd el-Malek Al Saleh, *The Right of the Individual to Personal Security in Islam*, in the Islamic Criminal Justice System London: (C. Bassiouni ed. 1982)84.

⁴²⁵ Muhammad Iqbal .Siddiqi, *The Penal Law of Islam*, (Lahore: Kazi Publishers, 1979)183.

⁴²⁶ Joseph .Schacht An Introduction of Islamic Criminal law(Oxford: Clarendon Press Oxford 1964)189.

*distort (justice) or decline to do justice, verily God is well acquainted with all ye do.*⁴²⁷

This is what the holy prophet (SAW) advised *Ali (R.A)* to do when he sent him to Yemen

.In this regard Ali is reported to have said: *When two men bring a case before you do not decide in favor of first till you hear what the other has to say, for it is best that you should have a clear idea of the best decision. Ali (R.A) said he had no doubt about a decision afterwards.*⁴²⁸ Every person has the right to be treated in accordance with the Law, and only in accordance with the Law.⁴²⁹ *Quran* assigns a very important place to justice in its moral principles for its violation leads to evil which destroys the basic harmony of social order. Social justice is an aspect of equilibrium *say! my Lord enjoineth justice*⁴³⁰

The Prophet promised that if his own daughter *Fatimma* committed theft that she would be treated as any other criminal and subjected to *Hudud* punishment (amputation).⁴³¹

It implies guarantees for individual freedom against any misuse of power economic, political or physical....by those who possess it there can be no justice if all are not equal before the law since all are equal before the God.⁴³² All persons are equal before the Law and are entitled to equal opportunities and protection of the Law.⁴³³ As regards the law of

⁴²⁷ Al-Quran, 4:135,trans. by Abdullah Yousuf Ali.

⁴²⁸ Al-Imam Ahmad bin Hanbal, *Masnad al-Imam ahmad bin Hanbal*, 15:208, Muhammad Bin Surah al-Tirmizi, al-Jamia'a al-Sahih,3:618.

⁴²⁹ Islamic Universal Declaration, Article 4(a).

⁴³⁰ The Holy Quran,7:29.

⁴³¹ Al-Awad, *The Basis of Islamic Penal Legislation*, in The Islamic Criminal Justice System (Cherif Bassiouni)ed.1982)140,Also available at file:///C:/Documents%20and%20Settings/Administrator/My%20Documents/Downloads/Documents/Islamic%20Criminal%20Law%20and%20Procedure%20Religious%20Fundamentalism%20v.%20M_3.pdf(Accessed31/01/2012),46.

⁴³² M.r. K Afzali &Dr. Arif Ali Khan, *Encyclopedia of Islamic Philosophy* ,4(New Delhi: Pentagon Press Hauz Khas New Delhi;2006),347.

⁴³³ Universal Islamic Declaration of Human Rights Article 3(a)

crimes and murder the Muslims law treated the Muslim and the non Muslim equally and the cases decided by the prophet of Islam and *Khalifas*.⁴³⁴

A governmental or judicial decision must be consistent with the *Shari'a*; otherwise it is a nullity. The Quran urges, *follow what has been sent down to you from your Lord, and follow no friends other than He....*⁴³⁵ ‘*Judgment belongs only to God; He has commanded that you shall not serve any but Him.*’⁴³⁶ Moreover whose judges not according to what God has sent down-they are the unbelievers.⁴³⁷

3.15 Benefit of Doubt for an Accused

In the entire world legal systems the benefit of any sort of doubt in a criminal is always to in accused person. Islam promulgated this principal it the time when the rest of the world was totally unaware of it.⁴³⁸ The quadi cannot rule to have the punishment carried out upon the accused whenever there is doubt as to whether or not the crime has been committed, or whether or not there was a legal justification for making it excusable. The Prophet of Allah said as, “*Do not carry out the prescribed punishments when there is doubt.*”⁴³⁹

Umar (R.A) has also referred to this principle by saying *Allah Knows the secrets (of character) of people and has averted from them the hadd punishment that cannot be awarded be accept on the basis of proof or oath.*⁴⁴⁰ According to the rules of Islamic Law

⁴³⁴ Al-Haj Mahomed Ullah Bin S. Jung, *A dissertation on The Administration of Justice of Muslim Law, Preceded by An Introduction to the Muslim Concept of the State* (Lahore: Huzaifah publications Afandi Manzal Aram Bagh.1980),135.

⁴³⁵ Quran, VII: 40.

⁴³⁶ *Ibid.*, XII: 40.

⁴³⁷ *Ibid.*, V: 47.

⁴³⁸ Shaukat Hayat, *In Islamic Code of Judicial Conduct*,2000(Islamabad: Royal Center Blu Area Margalla Communications),189.

⁴³⁹ <http://www.ummah.com/forum/showthread.php?161890-Criminal-Law-in-Islam>, (Accessed:30/01/2012)

⁴⁴⁰ Ala bin al-Dar Qutni, *Sunan al-Dar Qutni*. 206,Ahmad al-Bayhqi, al-Sunan al-kubra ,4:150, Muhammad al Sinani, *Subul al-Salam*,4:119.(Umer Letter to Abu Musa al-Ashari) ,Translation by

the benefit of a doubt regarding criminal cases goes to the accused person and he is presumed to be innocent till the case has been proved against him. In accordance with the rules of Islamic law of evidence as a result no hadd punishment shall be awarded in a case of slightest doubt concerning evidence or witness. The prophet reported to have said the "*avert the hadd punishments in case of doubt. Turn away death (punishment) from Muslims as much as you can.*"⁴⁴¹

Islam does not require that every accused person must be convicted to a punishment. It requires that only such accused is to be convicted against whom an offence is fully proved by way of the required quantum of testimony. There is no harm if a judge is mistaken in acquitting an accused person but it is greatly abhorrent if he is mistaken in award of punishment to an innocent person. If an accused person is successful in escaping a punishment for the offence committed by him he can in no way escape the punishment which he is going to suffer in the court of *Allah (SAW)* on the Day of Judgment. Therefore, it is not so serious if a judge has mistakenly acquitted an accused person.⁴⁴² The Holy Prophet (*S.A.W*) is reported to have said:

*Avert the Hadd punishments from Muslims as much as you can, if there is a way out (for an accused) set him free. Indeed the mistake of a ruler in pardoning is better than the mistake in awarding punishment.*⁴⁴³

Shaukat Hayat *An Islamic Code of Judicial Conduct* (Islamabad: Royal Center, Margalla Communications,2000),174.

⁴⁴¹ Al-Dar ul Qutni ,*ali bin Umar ,Sunan dar al Qutni*,(with al -tal'iq al-Mughni),3:84.

⁴⁴² Shaukat Hayat,*An Islamic Code of Judicial Conduct*(Islamabad: Royal Center Margalla Communications,2000),189-90.

⁴⁴³ Mohammad Ibne Surah,bin al-Tirmizi 'Eva, *al -Jamā' alSahih*,4:33.

crimes and murder the Muslims law treated the Muslim and the non Muslim equally and the cases decided by the prophet of Islam and *Khalifas*.⁴³⁴

A governmental or judicial decision must be consistent with the *Shari'a*; otherwise it is a nullity. The Quran urges, *follow what has been sent down to you from your Lord, and follow no friends other than He....*⁴³⁵ ‘*Judgment belongs only to God; He has commanded that you shall not serve any but Him.*’⁴³⁶ Moreover whose judges not according to what God has sent down-they are the unbelievers.⁴³⁷

3.15 Benefit of Doubt for an Accused

In the entire world legal systems the benefit of any sort of doubt in a criminal is always to in accused person. Islam promulgated this principal it the time when the rest of the world was totally unaware of it.⁴³⁸ The quadi cannot rule to have the punishment carried out upon the accused whenever there is doubt as to whether or not the crime has been committed, or whether or not there was a legal justification for making it excusable. The Prophet of Allah said as, “*Do not carry out the prescribed punishments when there is doubt.*”⁴³⁹

Umar (R.A) has also referred to this principle by saying *Allah Knows the secrets (of character) of people and has averted from them the hadd punishment that cannot be awarded be accept on the basis of proof or oath.*⁴⁴⁰ According to the rules of Islamic Law

⁴³⁴ Al-Haj Mahomed Ullah Bin S. Jung, *A dissertation on The Administration of Justice of Muslim Law, Preceded by An Introduction to the Muslim Concept of the State* (Lahore: Huzaifah publications Afandi Manzal Aram Bagh,1980),135.

⁴³⁵ Quran, VII: 40.

⁴³⁶ *Ibid.*, XII: 40.

⁴³⁷ *Ibid.*, V: 47.

⁴³⁸ Shaukat Hayat, *In Islamic Code of Judicial Conduct*,2000(Islamabad: Royal Center Blu Area Margalla Communications),189.

⁴³⁹ <http://www.ummah.com/forum/showthread.php?161890-Criminal-Law-in-Islam>, (Accessed:30/01/2012)

⁴⁴⁰ Ala bin al-Dar Qutni, *Sunan al-Dar Qutni*, 206,Ahmad al-Bayhqi, al-Sunan al-kubra ,4:150, Muhammad al Sinani, *Subul al-Salam*,4:119.(Umer Letter to Abu Musa al-Ashari) ,Translation by

the benefit of a doubt regarding criminal cases goes to the accused person and he is presumed to be innocent till the case has been proved against him. In accordance with the rules of Islamic law of evidence as a result no hadd punishment shall be awarded in a case of slightest doubt concerning evidence or witness. The prophet reported to have said the "*avert the hadd punishments in case of doubt. Turn away death (punishment) from Muslims as much as you can.*"⁴⁴¹

Islam does not require that every accused person must be convicted to a punishment. It requires that only such accused is to be convicted against whom an offence is fully proved by way of the required quantum of testimony. There is no harm if a judge is mistaken in acquitting an accused person but it is greatly abhorrent if he is mistaken in award of punishment to an innocent person. If an accused person is successful in escaping a punishment for the offence committed by him he can in no way escape the punishment which he is going to suffer in the court of *Allah (SAW)* on the Day of Judgment. Therefore, it is not so serious if a judge has mistakenly acquitted an accused person.⁴⁴² The Holy Prophet (*S.A.W*) is reported to have said:

*Avert the Hadd punishments from Muslims as much as you can, if there is a way out (for an accused) set him free. Indeed the mistake of a ruler in pardoning is better than the mistake in awarding punishment.*⁴⁴³

Shaukat Hayat *An Islamic Code of Judicial Conduct* (Islamabad: Royal Center, Margalla Communications,2000),174.

⁴⁴¹ Al-Dar ul Qutni ,*ali bin Umar ,Sunan dar al Qutni*,(with al –tal’iq al-Mughni),3:84.

⁴⁴² Shaukat Hayat,*An Islamic Code of Judicial Conduct*(Islamabad: Royal Center Margalla Communications,2000),189-90.

⁴⁴³ Mohammad Ibne Surah,bin al-Tirmizi ‘Eva, *al –Jamai alSahih*,4:33.

Chapter- IV

Comparison of Accused and his Rights in Islamic Criminal Law and International Criminal Law

The interests that are required by the Lawgiver to be preserved and protected by the Islamic law are categorized in five principles.⁴⁴⁴

Criminal law in Islam is aimed at securing human welfare. Its general precepts exist to uphold universal principles that govern every human need. These universal principles are:

1. The preservation and protection of religion
2. The preservation and protection of life.
3. The preservation and protection of reason and intellect.
4. The preservation of and protection of lineage and progeny.
5. The preservation and preservation of property and wealth.

The general structure of Islamic criminal law and international law, its classification and consequential obligations and duties, revolve around a set of rights.⁴⁴⁵ It is generally believed that there are two type of classification of rights called, the divine rights and positive or manmade rights.

- 1) Rights to Allah, and
- 2) The right of the individual.

And in western law there are also two types of rights

⁴⁴⁴ Imran Ahmad Khan Nyazee, Outlines of *Islamic Jurisprudence* (Rawalpindi:Federal Law House, 2010),190.

⁴⁴⁵ Ibid.,92.

1) The private rights

2) The public rights

In Criminal law the Rights of Allah are Hadud and the rights of individual are so many rights, Sometimes the rights of God and Individuals are consider same and equal. And in some cases the Right of Allah are prevail and in some circumstances the right of individual predominant. The Public rights are the rights of Imam and which is considered the right of Allah.

The Islamic penal system is aimed at preserving these five universal needs. For example, to preserve life, it prescribes the law of retribution, to preserve reason it prescribes the punishment for drinking, and to preserve property, it prescribes the punishment for theft. For the sake of comparison the rights of accused, the Islamic criminal law and international criminal law are going side by side. Both systems provide all rights which required to accused. The laws of positive rights have taken benefit and assistance and followed the Islamic law.

The Comparative rights of the accused in Islamic criminal law and international law are given below with detail.

The presumption of innocence is the basic right of accused and most important principle of both laws. This principle is generally to avoid the amalgamation of accused with convict persons. It will be not out of place to say that the primary right of accused in Islamic criminal law is to consider innocent until proven him guilty. The tradition of our holy Prophet is as; *avoid using circumstantial evidence especially in hadud.*⁴⁴⁶ Another

⁴⁴⁶ *Al-Hadith*

place He (SAW) reports, *the onus of proof is on the petitioner and the oath is for respondent.*⁴⁴⁷ Like this in international law the presumption of innocence is also supported through various documents and international instruments. Article 66 of The Rome Statute of the ICC provides, everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law⁴⁴⁸ The International Bill of Human Rights states, everyone charged with a crime has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.⁴⁴⁹

The fair, speedy and open trial by competent, independent impartial and regularly constituted court previously established by law is also a sacred right of accused. Both laws recognize this right of accused. Rest rights are just a building stand on it. In the fairness here means not only the trial or *qadi* court but the *qadi* also must be a person of good qualities and intelligence as well. The international law deems the fair trial a wide term which considers the base for the other rights of accused. In other words fair trial is a trial in which both parties are to be dealt with equality and there will be no discrimination in the rights of both accused and prosecutor. In fair trial the accused has the right to be heard by competent independent court. The Rome Statute Art.67 (a) provides the guarantees, in full equality that the accused once arrested, has the right to be informed immediately and in detail of the temperament, cause and content of the accusation, in a language which the accused fully understands and speaks partial court, The trial is to be public hearing and heard with a reasonable time.⁴⁵⁰ To have the free assistance of an interpreter if he cannot understand or speak the language used in court.⁴⁵¹ To have

⁴⁴⁷ Al-tirmizi *al Sunan babal Buyoo* 1606.

⁴⁴⁸ Rome Statute of ICC,Art.66 (1).

⁴⁴⁹ UDHR, Article11 (1)..

⁴⁵⁰ Rome Statute of ICC, Art .67.

⁴⁵¹ ICCPR , Article 14(3)(f).

legal support of the person's choosing, or, if the person does not have legal support, to have assistance assigned to him, in any case where the benefit of justice so require, and without payment by the person in any such case if the person does not have satisfactory means to pay for it⁴⁵² According to ICCPR Art.14 (3) (g) 'No one to be forced to be a witness against himself or to confess guilt.⁴⁵³, The Statute of ICC Art.55, Clause2 Para b, claims that to remain silent, without such silence being a consideration in the determination of guilt or innocence.⁴⁵⁴ A person shall not be compelled to incriminate him or herself or to confess guilt.⁴⁵⁵ Article 7 of ICCPR prohibits torture and cruel, inhuman or degrading punishment. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, accused shall not be subjected without his free consent to medical or scientific test.⁴⁵⁶ Art. 55(1) (b) of ICC Statute laid down that a person Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment.⁴⁵⁷

Acts are only described as prohibited if their prohibition is stated in the sacred texts. This principle is implied in the holy Qur'ân, "*We would punish no one until after we had sent a Messenger*" and: *Your Lord would not destroy the towns until He sent a messenger to the mother of the towns who would recite to them our signs. The same is also recognized in international law.* Article11 (2) of the UDHR protects "no one shall be held guilty of any penalty on the response of any act which did not constitute a penal

⁴⁵² The Rome Statute of the International Criminal Court, Article 55(2)(c).

⁴⁵³ ICCPR, Article1 4(3)(g).

⁴⁵⁴ The Rome Statute of the International Criminal Court, Article55 (2)(b).

⁴⁵⁵ *Ibid.*, Article (55)Clause (1)Paragraph(a).

⁴⁵⁶ ICCPR,Article7.

⁴⁵⁷ The Rome Statute of the International Criminal Court (1998) Art.55,Clause 1,Paragraph(b).

offence, under international criminal law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.⁴⁵⁸

In Islamic Criminal law previous violations are to be pardoned and punishments are not retroactive. This rule, which is a consequence of the previous one, means that the holy texts that prescribe fixed punishments for certain crimes are not to be carried out who committed these acts before the texts prohibiting them were revealed. They are only valid to those who commit these crimes after the punishments for those crimes have been prescribed. God the Glorious states *Allah has pardoned what has passed. and: Say to those who disbelieve that if they desist, Allah will forgive them what has passed*'.

In spite of the above detail the Islamic criminal law is vast than international criminal law. And some necessary rights and privileges have been left out.

Islamic law does not legally permit anyone to discharge an obligation by a person on behalf of another person or to abstain from a forbidden act on behalf of him. It is also included in the category of legal responsibility for an act which is beyond one's power.⁴⁵⁹ This means, the accused shall not be solely accountable for the crime of others, and no one else will bear the burden of an action that he committed.⁴⁶⁰ In the holy Quran Allah says, *No soul will earn any wrong except against itself. No one shall bear the burden of*

⁴⁵⁸ UDHR, Article, 11(2).

⁴⁵⁹ Dr. Ahmad Hasan, *Principles of Islamic jurisprudence*, (Islamabad: IRI, 1993), 261.

⁴⁶⁰ [p://www.ummah.com/forum/showthread.php?161890-Criminal-Law-in-Islam](http://www.ummah.com/forum/showthread.php?161890-Criminal-Law-in-Islam)

another.⁴⁶¹ Whoever does good, then it is for his own soul, and whoever does wrong then it is against it.⁴⁶²

The Islamic penal code is universally implemented to everyone, without discrimination and distinction.⁴⁶³ The holy *Qur'an* observes, *O mankind, We have created you from a male and a female and made you into nations and tribes so you can come to know one another. Verily, the most noble of you with Allah is the most righteous.*"

Allah's Messenger (SAW) illustrated the principle of equality in carrying out punishments when a woman from the *Makhzam* tribe – one of the noblest family within the tribe of *Quraysh* – committed theft. The people of *Quraysh* interceded to have her acquitted, but *Allah's Messenger (SAW)* preferred the statement as, *O people, those who came before you came to ruin only because they used to pardon their nobility when they stole and would carry out the punishment on the weak. By Allah, if Fatimah, the daughter of Muhammad (SAW), committed theft; I would cut off her hand.*⁴⁶⁴

The *qadi* cannot rule to have the punishment carried out upon the accused whenever there is doubt as to whether or not the crime has been committed, or whether or not there was a legal justification for making it excusable. Our holy Prophet said, "Do not carry out the prescribed punishments when there is doubt."⁴⁶⁵

Islamic Law recognizes two kinds of punishments,

⁴⁶¹ *Al-Quran.*

⁴⁶² *Ibid.*, 6:164.

⁴⁶³ [p://www.ummah.com/forum/showthread.php?161890-Criminal-Law-in-Islam](http://www.ummah.com/forum/showthread.php?161890-Criminal-Law-in-Islam)

⁴⁶⁴ [p://www.ummah.com/forum/showthread.php?161890-Criminal-Law-in-Islam](http://www.ummah.com/forum/showthread.php?161890-Criminal-Law-in-Islam) (Accessed:20/02/2012).

⁴⁶⁵ *Ibid.*,

- (I) Punishments that are prescribed by the Qur'an and Sunnah for particular crimes. These punishments cannot be waived or modified when a conviction is *had*.⁴⁶⁶
- (II) Punishments that are left on the discretion of *qadi*. These are to be applied in cases where the divine texts establish the prohibition of certain activities without setting down for them a prescribed punishment. In these cases, the punishment is to be determined by legislation or by the presiding judge in light of the indications given by the prescribed punishments for other crimes.⁴⁶⁷

The accused has the right to check the credibility of witness to defend himself of the alleged accusations.⁴⁶⁸

The accused also has the right of confession in *Shariah* law, while in international criminal law has no such rights being provided to the accused.

4.3 Islamic System of Justice (*Adl*) and International Laws

The world “justice, as an attribute of God, commands for its full implementation as the Quran says: “When you judge between man and man that ye judge with justice.”⁴⁶⁹ The administration of Justice has always been regarded as one of the great ends of every civilized Government. But the importance given to it by Islam may well be gathered from the fact that “Justice “is considered to be an attribute of God and the Administration of

⁴⁶⁶ [p://www.ummah.com/forum/showthread.php?161890-Criminal-Law-in-Islam](http://www.ummah.com/forum/showthread.php?161890-Criminal-Law-in-Islam)
(Accessed:20/02/2012).

⁴⁶⁷ *Ibid.*,

⁴⁶⁸ Dr.anwarullah,*Islamic Law of Evidence* ,(Islamabad:Shariah Academy IIU,1994),1.

⁴⁶⁹ Abdullah Yousuf Ali, trans., *al-Quran* (Islamabad: Dawah Academy),04:58. Also Verse No 135.

Justice as the performance of a religious duty.⁴⁷⁰ In the *Shariah* system of justice in the light of the policy of the judicial principles, the position and the status of the qadi is sacred.⁴⁷¹ For the proper fulfillment of the obligatory command, the principles provide that the petitioner/ plaintiff and the witnesses should morally and legally prove their claim with truth and honest, and it becomes a command duty of the Magistrate/judge that he should impose the claim over the accused/defendant with justice and righteousness.⁴⁷²

*The administration of justice is a definite ordinance of Allah (Subhanahu wa ta'ala) and is a general followed practice.⁴⁷³ justice is to be administered through open courts where trial is held openly . The parties are allowed to engage jurists and lawyers to assist them in their trials and justice is thus within the reach of all, cheap, ready, and speedy.*⁴⁷⁴

⁴⁷⁰ Al –Haj Mahomed Ullah Bin S.Jung, *The Administration of Justice in Islam: An Introduction to the Muslim Conception of the state*,(Lahore: Law Publishing Company Katchery Road,Lahore,1983),1.

⁴⁷¹ Anwar A. Qadri, *Islamic Jurisprudence in the Modern World* (Lahore: Ashraf Printing Press SH. Muhammad Ashraf,1981),480.

⁴⁷² Ibid.,481.

⁴⁷³ Ala bin al-Dar Qutni, Sunan al-Dar Qutni. 206,Ahmad al-Bayhqi, al-Sunan al-kubra , 4:150,Muhammad al Sinani, Subul al-Salam,4:119.(Umer Letter to Abu Musa al-Ashari) ,Trans by Shaukat Hayat An Islamic Code of Judicial Conduct (Islamabad: Royal Center, Margalla Communications,2000),174.

⁴⁷⁴ Engr. Akhtar Khalid Bhati and Dr. Gul-e- Jannat, *The Holy Quran on Human Rights*(Karachi: Royal Book Company,1996),74.

Chapter-V

Conclusion and Recommendations

The very conclusion of this thesis is simple, It elucidates, how the ambiguity, vague, doubts are to be removed from allegation made by person? How investigations, inquiries are to be made true and correct? What methods/processes are to be taken for the true dispensation of justice between accused and prosecution? Efforts have been made to attempt other questions like these.

These rights are given to the accused by two sources, one is *Shariah* and the other source is international law. We need to explain it into a little more detail. This contribution clarify that *Shariah* law is divine law hence, no need for reformations or any change, while the later one is a man made law subject to be changed and modified according to place and time or even circumstances. There is a need of the day to admit that Islamic law has a rich legal tradition in the area of international criminal law and relations with non Muslim countries. This legal heritage must be kept in view while analyzing international instruments to which Muslims are now a party. It will be not out of place to say, that first of all Islamic law admitted complete rights of accused as early as in the days of ignorance(*Jahiliyyah*). This is the reason that the international criminal law interpreted in the light of the injunctions of the *Shariah* and Islamic values.

Actually international criminal law originated about a century or less ago, and often got influence from prevailing laws. We can say that the Islamic law is the host and real mean /source of international criminal law. International criminal law adopted the principles of Islamic criminal law and benefited from it for the best interest of accused

according to place, time and circumstances. The grounds inferred by international law are the recognized rights of the accused and suspected person. Therefore various extra concessions have been made in the favor of accused which is interruption in the rights of prosecution and state. In other words the accused may wrongly use the extra concessions.

“Islam is a divine and universal accepted religion based on the injunctions of the *Quran* and *Sunnah*. This law has own independent rules, procedure and broad concept.

The difference between Islamic Criminal Law and International Criminal Law is that in Islamic criminal law interests are determined by the law giver for the subjects. In the case of international criminal law, these interests have been determined by the people for themselves, and are likely to vary in different places and in different times. Further the method of preference of one interest over the other in case of conflict is also likely to differ from the method in Islamic Criminal law. As for respect for the criminal law is concerned it follows naturally from obedience to religious law. On the other Hand the purposes International Criminal Law wants to help in its smooth implementation as well as the evaluation of the machinery set up for its implementation.

The purpose of criminal law to forbid and prevent conduct that unjustifiably and similar to international law, there are two common ways to initiate a criminal investigation in contemporary Islamic states. According to legal criminal procedure, criminal action may initiate to a competent court. The *qadi* will then exercise his judgment whether to formerly prosecute the matter. The second is when any one of a range of government agencies conducts a criminal investigation with the assistance of the investigation. If the investigator deems the evidence against the accused to be sufficient then he will refer the

matter to the respective court and *qadi* who issues a summons for arrest if the accused is not already arrested.

I would like to bring all those existing factors whether not in practice or rarely in practice while necessary for the dealing and treatment of accused. International criminal law is a body of international law designed to prohibit certain categories of conduct commonly viewed as serious violence and to make perpetrators of such conduct criminally accountable for their perpetration. Principally, it deals with crimes against humanity, genocide, war crimes as well as the war of aggression. This also discusses crimes against international law, which may not be the part of body of international criminal law. International criminal law comprises elements of both international law and criminal law in that although its sources are those of international law, its consequences are penal sanctions imposed on individuals.

This study has proved that Islamic criminal law is superior to the international criminal law. International criminal law has benefited from the provisions of Islamic criminal law. Islamic criminal law is being practiced in many Muslim countries of the world such as Pakistan, Saudi Arabia, Egypt, Iran, Afghanistan and Sudan etc. These statistics of the crimes in the world amply display that crime rate in Islamic countries is much less as compared to the other countries of the world.

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